* Together with Massachusetts v. United States No. 162
Liggett & Myers Tobacco Co. v. United States No. 163

# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1936

## No. 161

LIGGETT AND MYERS TOBACCO CO., PETITIONER,

*vs.*

THE UNITED STATES

## No. 162

THE COMMONWEALTH OF MASSACHUSETTS, PETITIONER,

*vs.*

THE UNITED STATES

## No. 163

LIGGETT AND MYERS TOBACCO CO., ON BEHALF OF THE COMMONWEALTH OF MASSACHUSETTS, PETITIONER,

*vs.*

THE UNITED STATES

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS

**PETITION FOR CERTIORARI FILED JULY 6, 1936.**

**CERTIORARI GRANTED OCTOBER 12, 1936.**

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1936**

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## No. 161

LIGGETT AND MYERS TOBACCO CO., PETITIONER,

*vs.*

THE UNITED STATES

## No. 162

THE COMMONWEALTH OF MASSACHUSETTS, PETITIONER,

*vs.*

THE UNITED STATES

## No. 163

LIGGETT AND MYERS TOBACCO CO., ON BEHALF OF THE COMMONWEALTH OF MASSACHUSETTS, PETITIONER,

*vs.*

THE UNITED STATES

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ON PETITION FOR WRITS OF CERTIORARI TO THE COURT OF CLAIMS

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# IN COURT OF CLAIMS OF THE UNITED STATES

Docket No. 42107

LIGGETT AND MYERS TOBACCO CO., Plaintiff,

v.

THE UNITED STATES OF AMERICA, Defendant

I. PETITION—Filed November 30, 1932

To the Honorable the Court of Claims:

The Plaintiff respectfully represents:

(1) The plaintiff is a corporation duly incorporated under the laws of New Jersey on or about November 24, 1911, with its principal office and place of business in the city of St. Louis, Missouri.

(2) On or about January 2, 1932, there was in effect the following provision in the Internal Revenue law:

(Sec. 761 of the United States Code. Sec. 3368, Revised Statutes, as Amended)

Tax on Tobacco and Snuff: Snuff Flour

Upon all tobacco and snuff manufactured in or imported into the United States, and sold by the manufacturer or importer, or removed for consumption or sale, there shall be levied, collected, and paid a tax of 18 cents per pound, to be paid by the manufacturer or importer thereof. Snuff [fol. 2] flour when sold or removed for use or consumption shall be taxed as snuff and shall be put up in packages and stamped in the same manner as snuff.

(3) Pursuant to the provisions of the Revised Statutes of the United States and subsequent Acts, the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, on April 24, 1928, promulgated Regulation 43 which Regulation provides as follows:

Art. 43. Rates of tax on tobacco and snuff.—Date effective—When tax accrues.—The rate of tax on tobacco and

snuff now in force is 18 cents per pound. The rate is the same as under the revenue acts of 1918, 1921, and 1924, but the tax is imposed by the above-quoted provisions of the revenue act of 1926, which became effective upon its enactment. That act was approved February 26, 1926. Such tax is imposed on all chewing and smoking tobacco, fine-cut, Cavendish, plug, or twist, cut or granulated, of every description, on tobacco twisted by hand or reduced into a condition to be consumed, or in any manner other than the ordinary mode of drying and curing, prepared for sale or consumption, even if prepared without the use of any machine or instrument, and without being pressed or sweetened, and on all fine-cut shorts and refuse scraps, clippings, cuttings, and sweepings of tobacco. Tax also accrues on snuff manufactured of tobacco or any substitute for tobacco, ground, dry, damp, pickled, scented, or otherwise, of all descriptions, when prepared for use, and on snuff flour when sold or removed for use or consumption. The tax accrues on such manufacturers upon removal from the factory or place where they were made, or upon sale prior to such removal, and is to be paid by the manufacturer thereof by the affixing of stamps before removal. Refuse scraps, clippings, cuttings, etc., are, how- [fol. 3] ever, not subject to tax when removed from the factory in compliance with article 99 of these regulations.

(4) On or about January 9th, 1932, the plaintiff sold to The Commonwealth of Massachusetts, a sovereign State, and on or about January 19, 1932, there was delivered to the Boston State Hospital, a governmental instrumentality of The Commonwealth of Massachusetts, for free distribution in institutional treatment, four 24 pound boxes of Joe Bowers tobacco, totalling 96 pounds, which made a net charge of $30.62 which sum $30.62 was paid to the plaintiff by the Commonwealth of Massachusetts on or about January 20, 1932.

(5) The purchase of this tobacco was authorized by the Legislature of Massachusetts, and the funds to pay for the cost thereof were levied on the citizens of Massachusetts under the power of taxation.

(6) At various dates through the purchase and accounting for tobacco tax stamps the plaintiff paid to the United States the sum of $17.28 as a tobacco tax at 18 cents a

pound on the 96 pounds purchased by The Commonwealth of Massachusetts, levied, assessed, collected and paid under the provisions of sec. 3368 of the Revised Statutes as amended.

(7) The tax in the sum of $17.28 on the said tobacco shipped for institutional treatment to The Commonwealth of Massachusetts, and received on or about January 19, 1932, was erroneously and illegally levied, assessed, collected and paid, for the reason that it was a direct interference with a governmental instrumentality, which under the decisions of the United States Supreme Court cannot be impeded or endangered by a tax exaction, and that the United States of America cannot enrich itself at the ex-
[fol. 4] pense of The Commonwealth of Massachusetts by a tax which falls directly upon a duly authorized governmental activity of Massachusetts.

(8) On or about January 25, 1932, the plaintiff filed a claim for the refund of the tax paid on the tobacco delivered to Massachusetts on or about January 19, 1932, in the sum of $17.28 with the Collector of Internal Revenue at St. Louis, Missouri. The claim set forth that

The accompanying statements and affidavits establish that the tax here sought to be recovered was paid by the claimant upon tobacco sold and delivered by it to The Commonwealth of Massachusetts, that the purchase of said tobacco by The Commonwealth of Massachusetts was under authority of and with money obtained from the citizens and taxpayers of Massachusetts and that the tobacco was distributed without charge to inmates of a State owned and conducted institution as an instrumentality of State government. The purchase and distribution of tobacco is a well established State function. No tobacco refunds have ever been received. The United States Constitution under interpretation of the United States Supreme Court not permitting the taxing of a State instrumentality, the amount collected by the United States as a tobacco tax from the claimant should be refunded.

In connection with this claim substantially the following was set out as a supplementary statement as to reasons why claim was made:

The statements and affidavits attached to the Claim are executed by duly accredited officials of The Commonwealth

of Massachusetts. The affidavit of Carl A. Raymond, Budget Commissioner, establishes the fact that Massachusetts appropriates money of its citizens and taxpayers [fol. 5] for the purpose of providing tobacco free to the inmates of the Boston State Hospital in order to carry out a long and well-established function of institutional treatment. The affidavit by George M. Kline, Commissioner of Mental Diseases, adds to the fact that the free distribution of tobacco is a well-established practice and that it is a necessary part of institutional treatment at the Boston State Hospital which is a duly established instrumentality of The Commonwealth of Massachusetts. The affidavit by Charles F. Hurley, Treasurer and Receiver-General shows that the money of the taxpayers of Massachusetts through the Treasury of The Commonwealth was employed to pay the tobacco tax upon which claim for refund is here requested. In order for Massachusetts to obtain tobacco for the Boston State Hospital, one of its instrumentalities, it was required to pay in addition to the price of the tobacco a sum representing the tax laid on the claimant as a tobacco tax which the claimant has paid to the Federal government.

Through a long line of decisions the Constitution of the United States has been interpreted by the Supreme Court of the United States as not permitting the federal government to lay a tax on a state. The decisions hold that neither the United States Government nor the States can tax the other for the purpose of enriching itself.

In the case of the Indian Motocycle Co. v. United States, 283 U. S. 570, the Supreme Court held that a tax law which impressed upon the manufacturer a tax that an instrumentality of Massachusetts was obliged to reimburse to the manufacturer in order to obtain a motor cycle contravened the Constitution of the United States. In that case the court held that:—

It is an established principle of our constitutional system of dual government that the instrumentalities, means and operations whereby the United States exercises its governmental powers are exempt from taxation by the States, and that the instrumentalities, means and operations [fol. 6] whereby the States exert the governmental powers belonging to them are equally exempt from taxation by the United States. This principle is implied from the inde-

pendence of the national and state governments within their respective spheres and from the provisions of the Constitution which look to the maintenance of the dual system. Collector v. Day, 11 Wall. 113, 125, 127; Willcuts v. Bunn, 282 U. S. 216, 224-225.

The court in its opinion after citing cases in substantiation of their opinion in this case said in the concluding part of the opinion:—

Under the constitutional principle the exertion of such a function by a State or a state agency has the same immunity from federal taxation that like exertions by the United States or its agencies have from state taxation. Here the tax is laid directly on the sale to a governmental state agency of an article purchased for governmental purposes. The sale and purchase constitute a single transaction, in which the purchaser is an essential participant. Without that participation the sale could not be effected. Thus, the transaction falls within the class which the United States cannot tax consistently with the constitutional principle.

The fact being here established that the tobaccco purchased by Massachusetts was in the exercise of the furtherance of a state instrumentality and that the Constitution of the United States as interpreted does not permit such an exaction against the state instrumentality, the refund requested should be made in the amount of $17.28.

(9) On or about October 17, 1932, the claim made by the plaintiff on or about January 25, 1932, was disallowed by letter of the Commissioner of Internal Revenue. The reason for disallowance is set forth at considerable length, the essence of which appears in the following quoted paragraphs:

[fol. 7] "Since the tax on tobacco attaches upon its removal from the factory, and the incidence of the tax is a closed transaction before the product is delivered, the inclusion of the tax paid by the manufacturer in the price for which he sells the tobaccco is not a payment of the tax by the purchaser. In is clear that the taxes on the tobacco purchased were not laid directly upon the sale thereof to the Commonwealth of Massachusetts; that the burden of

the tax on the commonwealth was indirect and merely incidental, and the manufacturers are not entitled to have the stamps used in paying the tax redeemed or receive a refund of any portion of the price paid for the product.

The claim for $17.28 is hereby rejected in full."

(10) No part of said sum of $17.28, erroneously collected by the United States of America, has been repaid to the plaintiff. The plaintiff has at all times borne true allegiance to the United States, and has not in any way aided, abetted or given encouragement to rebellion against said government. It is the sole and absolute owner of the claim herein presented. It has made no transfer or assignment of said claim or any part thereof, and is justly entitled to the amount claimed hereunder from the United States after allowing of just credits and setoffs. The plaintiff, however, is free to admit that it would upon the allowance of this claim refund the amount to The Commonwealth of Massachusetts as an amount to which The Commonwealth of Massachusetts would be fairly entitled as it is no part of the purchase price of the tobacco that Massachusetts purchased for free distribution in institutional treatment.

(11) The plaintiff, therefore, prays judgment in the sum of $17.28, with interest thereon at six per cent per annum [fol. 8] from January 20, 1932, the date of the payment of said tax by The Commonwealth of Massachusetts.

Liggett and Myers Tobacco Co., by G. W. Whitaker, Vice President. Henry F. Long, Attorney for for Plaintiff, 239 State House, Boston, Massachusetts.

*Duly sworn to by G. W. Whitaker. Jurat omitted in printing.*

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[fol. 9] II. General Traverse—Filed January 9, 1933

And now comes the Attorney General, on behalf of the United States, and answering the petition of the plaintiff herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Charls B. Rugg, Assistant Attorney General.

[fol. 10] IN COURT OF CLAIMS OF THE UNITED STATES

Docket No. 42411

THE COMMONWEALTH OF MASSACHUSETTS, Plaintiff,

v.

THE UNITED STATES OF AMERICA, Defendant

III. PETITION—Filed April 17, 1933

To the Honorable the Court of Claims:

The Plaintiff respectfully represents:

(1) The plaintiff is The Commonwealth of Massachusetts, a sovereign State.

(2) On or about January 2, 1932, there was in effect the following provision in the Internal Revenue law:

(Sec. 761 of the United States Code. Sec. 3368, Revised Statutes, as Amended)

Tax on Tobacco and Snuff: Snuff Flour

Upon all tobacco and snuff manufactured in or imported into the United States, and sold by the manufacturer or importer, or removed for consumption or sale, there shall be levied, collected, and paid a tax of 18 cents per pound, [fol. 11] to be paid by the manufacturer or importer thereof. Snuff flour when sold or removed for use or consumption shall be taxed as snuff and shall be put up in packages and stamped in the same manner as snuff.

(3) Pursuant to the provisions of the Revised Statutes of the United States and subsequent Acts, the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, on April 24, 1928, promulgated Regulations 8, Article 43 which Article provides as follows:

Art. 43. Rates of tax on tobacco and snuff.—Date effective—When tax accrues.—The rate of tax on tobacco and snuff now in force is 18 cents per pound. The rate is the same as under the revenue acts of 1918, 1921, and 1924, but the tax is imposed by the above-quoted provisions of the

revenue act of 1926, which became effective upon its enactment. That act was approved February 26, 1926. Such tax is imposed on all chewing and smoking tobacco, fine-cut, Cavendish, plug, or twist, cut or granulated, of every description, on tobacco twisted by hand or reduced into a condition to be consumed, or in any manner other than the ordinary mode of drying and curing, prepared for sale or consumption, even if prepared without the use of any machine or instrument, and without being pressed or sweetened, and on all fine-cut shorts and refuse scraps, clippings, cuttings, and sweepings of tobacco. Tax also accrues on snuff manufactured of tobacco or any substitute for tobacco, ground, dry, damp, pickled, scented, or otherwise, of all descriptions, when prepared for use, and on snuff flour when sold or removed for use or consumption. The tax accrues on such manufactures upon removal from the factory or place where they were made, or upon sale prior to such removal, and is to be paid by the manufacturer thereof by the affixing of stamps before removal. Refuse [fol. 12] scraps, clippings, cuttings, etc., are, however, not subject to tax when removed from the factory in compliance with article 99 of these regulations.

(4) The plaintiff purchased from the Liggett and Myers Tobacco Co., the manufacturer, the following described tobacco, on or about January 9, 1932, and on or about January 19, 1932, pursuant to said purchase, there was delivered to the Boston State Hospital, a governmental instrumentality of The Commonwealth of Massachusetts, for free distribution in institutional treatment, four 24 pound boxes of Joe Bowers tobacco, totalling 96 pounds, which made a net charge of $30.62 which sum $30.62 was paid to the Liggett and Myers Tobacco Co. by The Commonwealth of Massachusetts on or about January 20, 1932.

(5) The purchase of this tobacco was authorized by the Legislature of Massachusetts, and the funds to pay for the cost thereof were levied on the citizens of Massachusetts under the power of taxation.

(6) At various dates through the purchase and accounting for tobacco tax stamps the Liggett and Myers Tobacco Co. paid to the United States the sum of $17.28 as a tobacco tax at 18 cents a pound on the 96 pounds purchased by The Commonwealth of Massachusetts, levied, assessed, col-

lected and paid under the provisions of Sec. 3368 of the Revised Statutes as amended. Said sum of $17.28 was included in the $30.62 charged to and collected from the plaintiff as aforesaid.

(7) The tax in the sum of $17.28 on the said tobacco shipped for institutional treatment to The Commonwealth of Massachusetts, and received on or about January 19, 1932, was erroneously and illegally levied, assessed, collected and paid, for the reason that it was a direct interference with a governmental instrumentality, which under [fol. 13] the decisions of the United States Supreme Court cannot be impeded or endangered by a tax exaction, and that the United States of America cannot enrich itself at the expense of The Commonwealth of Massachusetts by a tax which falls directly upon a duly authorized governmental activity of Massachusetts.

(8) A claim for the refund of the tax paid on the tobacco delivered to Massachusetts on or about January 19, 1932, in the sum of $17.28 was filed. The claim set forth that

The purchase of the tobacco by The Commonwealth of Massachusetts was under authority of and with money obtained from the citizens and taxpayers of Massachusetts and that the tobacco was distributed without charge to inmates of a State owned and conducted institution as an instrumentality of State Government. The purchase and distribution of tobacco is a well-established State function. No tobacco refunds have ever been received. The United States Constitution under interpretation of the United States Supreme Court not permitting the taxing of a State instrumentality, the amount collected by the United States as a tobacco tax from the claimant should be refunded.

In connection with this claim substantially the following was advanced as a supplementary statement as to reasons why claim was made:

The statements and affidavits supporting the Claim are executed by duly accredited officials of The Commonwealth of Massachusetts. The affidavit of Carl A. Raymond, Budget Commissioner, establishes the fact that Massachusetts appropriates money of its citizens and taxpayers for the purpose of providing tobacco free to the inmates of the

Boston State Hospital in order to carry out a long and well-[fol. 14] established function of institutional treatment. The affidavit by George M. Kline, Commissioner of Mental Diseases, adds to the fact that the free distribution of tobacco is a well-established practice and that it is a necessary part of institutional treatment at the Boston State Hospital which is a duly established instrumentality of The Commonwealth of Massachusetts. The affidavit by Charles F. Hurley, Treasurer and Receiver-General, shows that the money of the taxpayers of Massachusetts through the Treasury of The Commonwealth was employed to pay the tobacco tax upon which claim for refund is here requested. In order for Massachusetts to obtain tobacco for the Boston State Hospital, one of its instrumentalities, it was required to pay in addition to the price of the tobacco a sum representing the tax paid on the claimant as a tobacco tax which the claimant has paid to the Federal government.

Through a long line of decisions the Constitution of the United States has been interpreted by the Supreme Court of the United States as not permitting the federal government to lay a tax on a state. The decisions hold that neither the United States Government nor the states can tax the other for the purpose of enriching itself.

In the case of the Indian Motocycle Co. v. United States, 283 U. S. 570, the Supreme Court held that a tax law which impressed upon the manufacturer a tax that an instrumentality of Massachusetts was obliged to reimburse to the manufacturer in order to obtain a motor cycle contravened the Constitution of the United States. In that case the court held that:

It is an established principle of our constitutional system of dual government that the instrumentalities, means and operations whereby the United States exercises its governmental powers are exempt from taxation by the States, and that the instrumentalities, means and operations whereby the States, exert the governmental powers belonging to them are equally exempt from taxation by the United States. This principle is implied from the independence [fol. 15] of the national and state governments within their respective spheres and from the provisions of the Constitution which look to the maintenance of the dual system. Col-

lector v. Day, 11 Wall. 113, 125, 127; Willcuts v. Bunn, 282 U. S. 216, 224-225.

The court in its opinion after citing cases in substantiation of their opinion in this case said in the concluding part of the opinion:

Under the constitutional principle the exertion of such a function by a State or a state agency has the same immunity from federal taxation that like exertions by the United States or its agencies have from state taxation. Here the tax is laid directly on the sale to a governmental state agency of an article purchased for governmental purposes. The sale and purchase constitute a single transaction, in which the purchaser is an essential participant. Without that participation the sale could not be effected. Thus, the transaction falls within the class which the United States cannot tax consistently with the constitutional principle.

The fact being here established that the tobacco purchased by Massachusetts was in the exercise of the furtherance of a state instrumentality and that the Constitution of the United States as interpreted does not permit such an exaction against the state instrumentality, the refund requested should be made in the amount of $17.28.

(9) On or about March 31, 1933, the claim made by the plaintiff was disallowed by letter of the Commissioner of Internal Revenue. The reason for disallowing is set forth at considerable length, the essence of which appears in the following quoted paragraphs:—

[fol. 16] "Since the tax on tobacco attaches upon its removal from the factory, and the incidence of the tax is a closed transaction before the product is delivered, the inclusion of the tax paid by the manufacturer in the price for which he sells the tobacco is not a payment of the tax by the purchaser. It is clear that the taxes on the tobacco purchased were not laid directly upon the sale thereof to the Commonwealth of Massachusetts; that the burden of the tax on the commonwealth was indirect and merely incidental, and it is not entitled to have the stamps used in paying the tax redeemed or receive a refund of any portion of the price paid for the product.

The claim for $17.28 is hereby rejected in full."

(10) No part of said sum of $17.28, erroneously collected by the United States of America, has been repaid to the Liggett and Myers Tobacco Co., or to The Commonwealth of Massachusetts.

(11) The plaintiff, therefore, prays judgment in the sum of $17.28, with interest thereon at six per cent per annum from January 30, 1932, the date of the payment of said tax by The Commonwealth of Massachusetts.

The Commonwealth of Massachusetts, (Signed) by Charles F. Hurley, Treasurer and Receiver-General. Joseph E. Warner, Attorney General, by Charles F. Lovejoy, Assistant Attorney General, Attorney for Plaintiff, 373 State House, Boston. Henry F. Long, 239 State House, Boston, Of Counsel.

[fol. 17] *Duly sworn to by Charles F. Hurley. Jurat omitted in printing.*

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[fol. 18] IV. General Traverse—Filed May 26, 1933

And now comes the Attorney General, on behalf of the United States, and answering the petition of the plaintiff herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

W. W. Scott, Acting Head, Court of Claims Division.

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[fol. 19] In Court of Claims of the United States

Docket No. 42412

Liggett and Myers Tobacco Co., on Behalf of The Commonwealth of Massachusetts, Plaintiff,

v.

The United States of America, Defendant

V. Petition—Filed April 17, 1933

To the Honorable the Court of Claims:

The Plaintiff respectfully represents:

(1) This proceeding is brought by the Liggett and Myers Tobacco Co., a corporation duly incorporated under the

laws of New Jersey on or about November 24, 1911, with its principal office and place of business in the city of St. Louis, Missouri, for and on behalf of The Commonwealth of Massachusetts, a sovereign State.

(2) On or about January 2, 1932, there was in effect the following provision in the Internal Revenue law:

[fol. 20] (Sec. 761 of the United States Code. Sec. 3368, Revised Statutes, as Amended)

Tax on Tobacco and Snuff: Snuff Flour

Upon all tobacco and snuff manufactured in or imported into the United States, and sold by the manufacturer or importer, or removed for consumption or sale, there shall be levied, collected, and paid a tax of 18 cents per pound, to be paid by the manufacturer or importer thereof. Snuff flour when sold or removed for use or consumption shall be taxed as snuff and shall be put up in packages and stamped in the same manner as snuff.

(3) Pursuant to the provisions of the Revised Statutes of the United States and subsequent Acts, the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, on April 24, 1928, promulgated Regulations 8, Article 43 which Article provides as follows:

Art. 43. Rates of tax on tobacco and snuff.—Date Effective—When tax accrues.—The rate of tax on tobacco and snuff now in force is 18 cents per pound. The rate is the same as under the revenue acts of 1918, 1921, and 1924, but the tax is imposed by the above-quoted provisions of the revenue act of 1926, which became effective upon its enactment. That act was approved February 26, 1926. Such tax is imposed on all chewing and smoking tobacco, fine-cut Cavendish, plug, or twist, cut or granulated, of every description, on tobacco twisted by hand or reduced into a condition to be consumed, or in any manner other than the ordinary mode of drying and curing, prepared for sale or consumption, even if prepared without the use of any machine or instrument, and without being pressed or sweetened, and on all fine-cut shorts and refuse scraps, [fol. 21] clippings, cuttings, and sweepings of tobacco. Tax also accrues on snuff manufactured of tobacco or any sub-

stitute for tobacco, ground, dry, damp, pickled, scented, or otherwise, of all descriptions, when prepared for use, and on snuff flour when sold or removed for use or consumption. The tax accrues on such manufactures upon removal from the factory or place where they were made, or upon sale prior to such removal, and is to be paid by the manufacturer thereof by the affixing of stamps before removal. Refuse scraps, clippings, cuttings, etc., are, however, not subject to tax when removed from the factory in compliance with article 99 of these regulations.

(4) The Commonwealth of Massachusetts purchased from the Liggett and Myers Tobacco Co., the manufacturer, on or about January 9, 1932, the following described tobacco, and on or about January 19, 1932, there was delivered to the Boston State Hospital, a governmental instrumentality of The Commonwealth of Massachusetts, for free distribution in institutional treatment, four 24 pound boxes of Joe Bowers tobacco, totalling 96 pounds, which made a net charge of $30.62 which sum $30.62 was paid to the Liggett and Myers Tobacco Co. by The Commonwealth of Massachusetts on or about January 20, 1932.

(5) The purchase of this tobacco was authorized by the Legislature of Massachusetts, and the funds to pay for the cost thereof were levied on the citizens of Massachusetts under the power of taxation.

(6) At various dates through the purchase and accounting for tobacco tax stamps the Liggett and Myers Tobacco Co. paid to the United States the sum of $17.28 as a tobacco tax at 18 cents a pound on the 96 pounds purchased by The Commonwealth of Massachusetts, levied, assessed, collected, and paid under the provisions of sec. 3368 of the Revised Statutes as amended. Said sum of $17.28 was [fol. 22] included in the $30.62 charged to and collected from The Commonwealth of Massachusetts as aforesaid.

(7) The tax in the sum of $17.28 on the said tobacco shipped for institutional treatment to The Commonwealth of Massachusetts, and received on or about January 19, 1932, was erroneously and illegally levied, assessed, collected and paid, for the reason that it was a direct interference with a governmental instrumentality, which under

the decisions of the United States Supreme Court cannot be impeded or endangered by a tax exaction, and that the United States of America cannot enrich itself at the expense of The Commonwealth of Massachusetts by a tax which falls directly upon a duly authorized governmental activity of Massachusetts.

(8) A claim for the refund of the tax paid on the tobacco delivered to Massachusetts on or about January 19, 1932, in the sum of $17.28 was filed. The claim set forth that:

The purchase of the tobacco by The Commonwealth of Massachusetts was under authority of and with money obtained from the citizens and taxpayers of Massachusetts and that the tobacco was distributed without charge to inmates of a state owned and conducted institution as an instrumentality of state government. The purchase and distribution of tobacco is a well established state function. No tobacco refunds have ever been received. The United States Constitution under interpretation of the United States Supreme Court not permitting the taxing of a State instrumentality, the amount collected by the United States as a tobacco tax from the claimant should be refunded.

In connection with this claim substantially the following was advanced as a supplementary statement as to reasons why claim was made:

[fol. 23] The statements and affidavits supporting the Claim are executed by duly accredited officials of The Commonwealth of Massachusetts. The affidavit of Carl A. Raymond, Budget Commissioner, establishes the fact that Massachusetts appropriates money of its citizens and taxpayers for the purpose of providing tobacco free to the inmates of the Boston State Hospital in order to carry out a long and well-established function of institutional treatment. The affidavit by George M. Kline, Commissioner of Mental Diseases, adds to the fact that the free distribution of tobacco is a well-established practice and that it is a necessary part of institutional treatment at the Boston State Hospital which is a duly established instrumentality of The Commonwealth of Massachusetts. The affidavit by Charles F. Hurley, Treasurer and Receiver-General shows that the money of the taxpayers of Massachusetts through

the Treasury of The Commonwealth was employed to pay the tobacco tax upon which claim for refund is here requested. In order for Massachusetts to obtain tobacco for the Boston State Hospital, one of its instrumentalities, it was required to pay in addition to the price of the tobacco a sum representing the tax laid on the claimant as a tobacco tax which the claimant has paid to the Federal government.

Through a long line of decisions the Constitution of the United States has been interpreted by the Supreme Court of the United States as not permitting the federal government to lay a tax on a state. The decisions hold that neither the United States Government nor the states can tax the other for the purpose of enriching itself.

In the case of the Indian Motocycle Co. v. United States, 283 U. S. 570, the Supreme Court held that a tax law which impressed upon the manufacturer a tax that an instrumentality of Massachusetts was obliged to reimburse to the manufacturer in order to obtain a motor cycle contravened the Constitution of the United States. In that case the court held that:

It is an established principle of our constitutional system of dual government that the instrumentalities, means [fol. 24] and operations whereby the United States exercises its governmental powers are exempt from taxation by the States, and that the instrumentalities, means and operations whereby the States exert the governmental powers belonging to them are equally exempt from taxation by the United States. This principle is implied from the independence of the national and state governments within their respective spheres and from the provisions of the Constitution which look to the maintenance of the dual system. Collector v. Day, 11 Wall. 113, 125, 127; Willcuts v. Bunn, 282 U. S. 216, 224-225.

The court in its opinion after citing cases in substantiation of their opinion in this case said in the concluding part of the opinion:

Under the constitutional principle the exertion of such a function by a State or a state agency has the same immunity from federal taxation that like exertions by the United

States or its agencies have from state taxation. Here the tax is laid directly on the sale to a governmental state agency of an article purchased for governmental purposes. The sale and purchase constitute a single transaction, in which the purchaser is an essential participant. Without that participation the sale could not be effected. Thus, the transaction falls within the class which the United States cannot tax consistently with the constitutional principle.

The fact being here established that the tobacco purchased by Massachusetts was in the exercise of the furtherance of a state instrumentality and that the Constitution of the United States as interpreted does not permit such an exaction against the state instrumentality, the refund requested should be made in the amount of $17.28.

(9) On or about April 10, 1933, the claim made by the plaintiff was disallowed by letter of the Acting Commis- [fol. 25] sioner of Internal Revenue. The reason for disallowance is set forth at considerable length, the essence of which appears in the following quoted paragraphs:

"Since the tax on tobacco attaches upon its removal from the factory, and the incidence of the tax is a closed transaction before the product is delivered, the inclusion of the tax paid by the manufacturer in the price for which he sells the tobacco is not a payment of the tax by the purchaser. It is clear that the taxes on the tobacco purchased were not laid directly upon the sale thereof to the Commonwealth of Massachusetts; that the burden of the tax on the commonwealth was indirect and merely incidental, and the manufacturers are not entitled to have the stamps used in paying the tax redeemed or receive a refund of any portion of the price paid for the product either for themselves or for benefit of the purchaser.

The claim for $17.28 is hereby rejected in full."

(10) No part of said sum of $17.28, erroneously collected by the United States of America, has been repaid to the Liggett and Myers Tobacco Co., or to The Commonwealth of Massachusetts.

(11) The plaintiff, therefore, prays judgment in the sum of $17.28, with interest thereon at six per cent per annum

from January 20, 1932, the date of the payment of said tax by The Commonwealth of Massachusetts.

Liggett and Myers Tobacco Co. on behalf of The Commonwealth of Massachusetts, by Henry F. Long, Its Attorney.

Henry F. Long, Attorney for Plaintiff, 239 State House, Boston, Massachusetts.

[fol. 26] *Duly sworn to by Henry F. Long. Jurat omitted in printing.*

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[fol. 27] VI. General Traverse—Filed May 26, 1933

And now comes the Attorney General, on behalf of the United Stafes, and answering the petition of the plaintiff herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

W. W. Scott, Acting Head, Court of Claims Division.

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[fol. 28] VII. Argument and Submission of Cases

On December 4, 1935, the three above mentioned cases were argued and submitted together on merits by Mr. Henry F. Long, for the plaintiffs, and by Mr. Fred K. Dyar, for the defendant.

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VIII. History of Proceedings

On January 6, 1936, the court filed findings of fact, conclusions of law, and entered judgment dismissing the petitions in the three cases, with an opinion by Green, J.

On February 24, 1936, the plaintiffs filed a motion for new trial and for amendment of findings in the three cases.

On April 6, 1936, the court entered the following order on said motion:

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[fol. 29] IX. Order Amending Findings—April 6, 1936

Now on this sixth day of April, 1936, upon consideration of the motion to amend the findings and for new trial in the three cases above mentioned, it is ordered by the Court

that the findings be amended by adding thereto the following:

The Boston State Hospital is maintained by the Commonwealth of Massachusetts for care and treatment of those having mental diseases. Institutional treatment of the insane has existed for several centuries although the early treatments were largely limited to the confinement of the violently insane. State treatment of the mentally diseased at public expense has existed in the United States and in the Commonwealth of Massachusetts for many years, but a few States provide practically no such facilities. The Boston State Hospital is useful in the maintenance of public welfare and order in the Commonwealth of Massachusetts. The power of restraining patients is conferred upon the hospital by the State. While there are private hospitals for the care of the insane located and operated in the State, they are conducted for profit and the average patient does not have the means to pay their charges. In the Boston State Hospital, patients pay if they are able, but if not pay nothing. The hospital performs a useful service.

It is further ordered that the above-entitled cases be set down for oral argument at the May term of this court, such argument to be confined to matters arising from or connected with the amendments made to the findings.

A ruling on the remainder of the motion is reserved until after oral argument has been made in accordance with this order.

[fol. 30] X. **Special Findings of Fact, as Amended by the Order of April 6, 1936, Conclusion of Law in the Three Cases, and Opinion of the Court by Green, J.**

No. 42107

LIGGETT AND MYERS TOBACCO CO.

v.

THE UNITED STATES

No. 42411

THE COMMONWEALTH OF MASSACHUSETTS

v.

THE UNITED STATES

No. 42412

LIGGETT AND MYERS TOBACCO CO., On Behalf of the COMMONWEALTH OF MASSACHUSETTS,

v.

THE UNITED STATES

Mr. Henry F. Long for plaintiffs.

Mr. Fred K. Dyar, with whom was Mr. Assistant Attorney General Frank J. Wideman, for defendant.

Mr. John J. Bennett, Jr., attorney general, as amicus curiæ for the State of New York. Mr. Wendell P. Brown was on the brief.

Mr. A. A. F. Seawell, attorney general, Mr. Charles Ross, and Mr. Edward A. Adams, as amici curiæ for the States of North Carolina, South Carolina, and California.

Mr. Paul A. Dever, attorney general, for the Commonwealth of Massachusetts. Mr. Charles F. Lovejoy was on the briefs.

These cases having been heard by the Court of Claims, the court, upon the evidence adduced, makes the following

SPECIAL FINDINGS OF FACT

The Liggett and Myers Tobacco Company is a corporation engaged in the business of dealing in and manufactur-

ing tobacco and pursuant to the law maintains a bonded warehouse for storing manufactured tobacco. The estab- [fol. 31] lished internal-revenue procedure was to affix the stamps required by law to be placed upon the manufactured tobacco before the tobacco was removed from the factory. About January 6, 1932, the plaintiff (Liggett and Myers) received an order from the Commonwealth of Massachusetts, through its purchasing agent, for four boxes of manufactured tobacco totaling ninety-six pounds net weight to be delivered to the Boston State Hospital, owned and operated by the Commonwealth of Massachusetts in that State. The plaintiff had in its bonded warehouse the tobacco so ordered in packages to which had been affixed the internal revenue stamps required by law duly canceled. The aggregate amount of the stamps so canceled was $17.28 and pursuant to the order received the tobacco was delivered about January 19, 1932, to the Boston State Hospital. On the day of shipment the plaintiff sent a bill to the Boston State Hospital in the sum of $30.62, being the price of the tobacco including the tax paid by internal revenue stamps. This bill was paid by the Commonwealth of Massachusetts.

The tobacco so shipped and received by the hospital was distributed free to patients thereof under the authority from the law of Massachusetts and in the course of institutional treatment of the patients.

The Boston State Hospital is maintained by the Commonwealth of Massachusetts for care and treatment of those having mental diseases. Institutional treatment of the insane has existed for several centuries although the early treatments were largely limited to the confinement of the violently insane. State treatment of the mentally diseased at public expense has existed in the United States and in the Commonwealth of Massachusetts for many years, but a few States provide practically no such facilities. The Boston State Hospital is useful in the maintenance of public welfare and order in the Commonwealth of Massachusetts. The power of restraining patients is conferred upon the hospital by the State. While there are private hospitals for the care of the insane located and operated in the State, they are conducted for profit and the average patient does not have the means to pay their charges. In the Boston State Hospital, patients pay if they are able,

but if not pay nothing. The hospital performs a useful service.

No. 42107

About January 25, 1932, the plaintiff filed with the collector of internal revenue at St. Louis, Missouri, a claim for the sum of $17.28, the amount of the stamps used in payment of the tax on the tobacco shipped to the hospital, alleging as the basis for the claim that the tax so sought to be recovered was paid by the plaintiff on tobacco sold and delivered by it to the Commonwealth of Massachusetts, which was by said State, in pursuance of the laws thereof, distributed without charge to inmates of a State owned and operated institution as an instrumentality of government. The claim for refund was disallowed.

Nos. 42411 and 42412

In each of these cases the plaintiff therein filed a claim for refund in due time and in proper form upon substantially the same grounds as were stated in the claim for refund filed in No. 42107.

Conclusion of Law in No. 42107

Upon the foregoing special findings of fact, which are made part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and it is therefore ordered that its petition be dismissed.

Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this case, the amount thereof to be ascertained by the clerk and collected by him according to law.

Conclusion of Law in No. 42411

Upon the foregoing special findings of fact, which are made part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and it is therefor ordered that its petition be dismissed.

[fol. 32] Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this case, the amount thereof to be ascertained by the clerk and collected by him according to law.

CONCLUSION OF LAW IN NO. 42412

Upon the foregoing special findings of fact, which are made part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and it is therefore ordered that its petition be dismissed.

Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this case, the amount thereof to be ascertained by the clerk and collected by him according to law.

OPINION

GREEN, Judge, delivered the opinion of the court:

The three cases above entitled are by agreement submitted together. The facts upon which the issue arises and the issue itself are the same in each case, but only one of the parties plaintiff can in any event recover judgment.

The Commonwealth of Massachusetts, a State, owns and operates a public hospital known as the Boston State Hospital. In the course of the treatment of patients in this hospital manufactured tobacco is distributed free of charge. The question involved in the case is whether the Federal tax on such tobacco is valid as against the State.

The Revenue Act of 1926 in section 401 (a) provides:

"Upon all tobacco and snuff manufactured in or imported into the United States, and hereafter sold by the manufacturer or importer, or removed for consumption or sale, there shall be levied, collected, and paid * * * a tax of 18 cents per pound, to be paid by the manufacturer or importer thereof."

The plaintiffs contend that under this statute the tax is upon the sale of the tobacco while the defendant, on the contrary, insists that it is upon both the removal and the sale. Both sides argue the question thus presented at length in their respective briefs, but we do not think it is necessary to pass upon it. The basis for plaintiffs' argument on this point is found in the opinions rendered in the cases of Panhandle Oil Co. v. Knox, 277 U. S. 218, and Indian Motocycle Co. v. United States, 283 U. S. 570. Both of these cases involve the question of how far the National

Government may go in taxing the agencies or instrumentalities of a State, but there was an important difference between the facts in those cases and the facts of the cases at bar. In both of the cited cases it was clear that the article in connection with which the tax was levied was used in the performance of an essential governmental function. In the Panhandle Oil case, the gasoline sold was used in operating the coast guard fleet and a veterans' hospital; and in the Indian Motocycle case, the article sold was used by and necessary to the State police force. It is well settled that neither a State nor the Nation can impose a tax which directly burdens the other in the exercise of its sovereign powers. Hence the decision in these cases turned [fol. 33] on the nature of the tax rather than upon the nature of the governmental operations with which it was claimed the tax interfered and upon which it cast a burden. In the cases now before us it is necessary to determine whether the operations of the State which are alleged to have been burdened by the tax were the exercise of an essential governmental function making use of governmental powers.

The manufactured tobacco in connection with which the tax was laid was sold to the State and the State made use of it in its hospital in the treatment of the patients there. Plaintiffs have presented evidence to show that the tobacco was properly used in the hospital treatment of its patients. We think this was unnecessary and that it would be presumed in the absence of evidence to the contrary that the tobacco was properly used, that the hospital was a benefit to the people of the State, and that the State had power to engage in its operation. For the purpose of the argument on the point now beng discussed, it may be assumed that the tax cast a burden upon the operation of the hospital. But it does not necessarily follow from these matters that the State can purchase tobacco free of tax.

In South Carolina v. United States, 199 U. S. 437, 461, the prevailing rule was indicated to be:

"* * * the exemption of State agencies and instrumentalities from national taxation is limited to those which are of a strictly *governmental* character, and does not extend to those which are used by the State in the carrying on of an ordinary private business." (Italics ours.)

By "strictly governmental character" reference is made, as we think, to those operations which embody some kind of control over persons or things which can be exercised only by a sovereign power. In other words, as stated in Metcalf & Eddy v. Mitchell, 269 U. S. 514, 522, while the line cannot be drawn in terms of universal application, the Supreme Court "has repeatedly held that those agencies through which either [State or Federal] government *immediately and directly exercises its sovereign powers,* are immune from the taxing power of the other." (Italics ours.) It follows conversely, that where the government engages in some business in which its sovereign powers are not exercised, its operations are not immune from taxation.

We think it obvious that in establishing and maintaining a hospital the State of Massachusetts is not exercising any sovereign power. Individuals or corporations can and do establish hospitals and it is a matter of common knowledge that they have done this in the State of Massachusetts. The hospital which is conducted by the State may be more beneficial to its citizens than those which are established by private individuals, but it accomplishes nothing which they could not do if they saw fit, and the powers which are exercised by the State in carrying on the hospital are simply those which belong to every individual who is possessed with the financial means to put them into execution.

The benefits conferred by the action of the State upon its citizens do not determine whether the State is exempt from the burdens of taxation by the Federal Government. To supply a community with pure water, or artificial light, to relieve the congestion of city streets by transportation, are enterprises that are beneficial to the public, often better [fol. 34] performed by the local government than by private concerns, and in some cases not likely to be undertaken by private citizens or corporations. Yet it has been held by the Supreme Court that these matters are not essential governmental functions. The ultimate question in the cases before us must be determined according to the nature of the power exercised, and if the power be one which does not belong exclusively to the State but is shared in common by individuals generally, the exercise of it does not bring immunity from taxation by the Federal Government. In the case of Flint v. Stone Tracy Co., 220 U. S. 107, 172, in which the same question arose, the Supreme Court said:

"The true distinction is between the attempted taxation of those operations of the States essential to the execution of its governmental functions, *and which the State can only do itself*, and those activities which are of a private character." (Italics ours.)

And having made this distinction, it held that the United States could not interfere by taxing the agencies of the State in carrying out the purposes of the first class but that the others were not removed from the field of legitimate taxation.

The operation of the hospital not being essential to the execution of the governmental functions of the State and not one which the State only could carry on, it follows that no immunity from taxation has been established and that the petition in each of the three cases must be dismissed. It is so ordered.

Whaley, Judge; Williams, Judge; Littleton, Judge; and Booth, Chief Justice, concur.

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[fol. 35] XI. JUDGMENT IN No. 42107

At a Court of Claims held in the City of Washington on the 6th day of April, A. D. 1936, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover.

It is therefore ordered and adjudged that the petition of the plaintiff, Liggett and Myers Tobacco Company, be and the same is hereby dismissed.

---

XII. JUDGMENT IN No. 42411

At a Court of Claims held in the City of Washington on the 6th day of April, A. D., 1936, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover.

It is therefore ordered and adjudged that the petition of the plaintiff, The Commonwealth of Massachusetts, be and the same is hereby dismissed.

XIII. JUDGMENT IN No. 42412

At a Court of Claims held in the City of Washington on the 6th day of April, A. D., 1936, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover.

It is therefore ordered and adjudged that the the petition of the plaintiff, Liggett and Myers Tobacco Co., on behalf of The Commonwealth of Massachusetts, be and the same is hereby dismissed.

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[fol. 36] XIV. ARGUMENT AND SUBMISSION OF PLAINTIFFS' MOTIONS FOR NEW TRIAL

On May 4, 1936, the plaintiffs' motions for new trial, in the three cases, were argued and submitted by Mr. Henry F. Long, for plaintiffs, and by Mr. Fred K. Dyar, for defendant.

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XV. ORDER OVERRULING PLAINTIFFS' MOTIONS FOR NEW TRIAL

It is ordered this 9th day of June, 1936, that the plaintiffs' motions for new trial, in the three above-mentioned cases, be and the same are hereby overruled.

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[fol. 37] Clerk's certificate to foregoing transcript omitted in printing.

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Endorsed on cover: Enter Henry F. Long. File Nos. 40,701, 40,702, 40,703. Court of Claims. Term No. 161. Liggett and Myers Tobacco Co., Petitioner, vs. The United States. Term No. 162. The Commonwealth of Massachusetts, Petitioner, vs. The United States. Term No. 163. Liggett and Myers Tobacco Co., on behalf of The Commonwealth of Massachusetts, Petitioner, vs. The United States. Petition for writs of certiorari and exhibit thereto. Filed July 6, 1936. Term Nos. 161, O. T., 1936, 162, O. T., 1936, 163 O. T., 1936.

[fol. 38] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1936

No. 161

ORDER ALLOWING CERTIORARI—Filed October 12, 1936

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

---

[fol. 39] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1936

No. 162

ORDER ALLOWING CERTIORARI—Filed October 12, 1936

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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[fol. 40] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1936

No. 163

ORDER ALLOWING CERTIORARI—Filed October 12, 1936

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

JUL 6
CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1936**

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# No. 161

LIGGETT AND MYERS TOBACCO CO.,
*Petitioner,*

*vs.*

THE UNITED STATES.

# No. 162

THE COMMONWEALTH OF MASSACHUSETTS,
*Petitioner,*

*vs.*

THE UNITED STATES.

# No. 163

LIGGETT AND MYERS TOBACCO CO., ON BEHALF OF THE COMMONWEALTH OF MASSACHUSETTS,
*Petitioner,*

*vs.*

THE UNITED STATES.

---

**PETITION FOR WRITS OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.**

---

HENRY F. LONG,
*Room 239, State House,*
*Boston, Massachusetts,*
PAUL A. DEVER,
*Attorney General,*
ROGER CLAPP,
*Assistant Attorney General,*
*Attorneys for Petitioners.*

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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1936**

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# No. 161

LIGGETT AND MYERS TOBACCO CO.,
*Petitioner,*

*vs.*

THE UNITED STATES.

# No. 162

THE COMMONWEALTH OF MASSACHUSETTS,
*Petitioner,*

*vs.*

THE UNITED STATES.

# No. 163

LIGGETT AND MYERS TOBACCO CO., ON BEHALF OF THE COMMONWEALTH OF MASSACHUSETTS,
*Petitioner,*

*vs.*

THE UNITED STATES.

---

## PETITION FOR WRITS OF CERTIORARI TO THE COURT OF CLAIMS.

---

Liggett and Myers Tobacco Co., The Commonwealth of Massachusetts, and Liggett and Myers Tobacco Co. on behalf of The Commonwealth of Massachusetts severally pray

that writs of certiorari issue to review the judgments of the Court of Claims of the United States ordered to be entered in the above causes on April 6, 1936 (R. 26-27), motions for new trial being denied June 9, 1936 (R. 27).

## Opinion Below.

The opinion of the Court of Claims (R. 23) is reported 13 F. Supp. 143. See also 14 F. Supp. 543.

## Jurisdiction.

The judgments of the Court of Claims were ordered to be entered April 6, 1936, and motion for new trial was denied June 9, 1936. The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925 (43 Stat. 939; United States Code Annotated, Sec. 288).

## Question Presented.

The principal question presented is whether the tax imposed by the Federal Revenue Act of 1926 in Section 401 upon tobacco sold by the manufacturer or removed for consumption or sale can, under constitutional limitations, apply to tobacco sold by the manufacturer to The Commonwealth of Massachusetts for free distribution in institutional treatment of the inmates of an insane hospital owned and operated by the Commonwealth.

## Statute Involved.

The principal portion of the Revenue Act of 1926 involved is Section 401(a) (U. S. Code, Title 26, Sec. 761) which reads as follows:

> "Upon all tobacco and snuff manufactured in or imported into the United States, and sold by the manufacturer or importer, or removed for consumption or sale, there shall be levied, collected, and paid a tax of

18 cents per pound, to be paid by the manufacturer or importer thereof. Snuff flour when sold or removed for use or consumption shall be taxed as snuff and shall be put up in packages and stamped in the same manner as snuff."

Other provisions relative to the tax upon tobacco are to be found in Chapter 14 of Title 26 of the U. S. Code.

**Statement.**

The Court of Claims made the following special findings of fact (R. 20):

"The Liggett and Myers Tobacco Company is a corporation engaged in the business of dealing in and manufacturing tobacco and pursuant to law maintains a bonded warehouse for storing manufactured tobacco. The established internal-revenue procedure was to affix the stamps required by law to be placed upon the manufactured tobacco before the tobacco was removed from the factory. About January 6, 1932, the plaintiff (Liggett and Myers) received an order from the Commonwealth of Massachusetts, through its purchasing agent, for four boxes of manufactured tobacco totaling ninety-six pounds net weight to be delivered to the Boston State Hospital, owned and operated by the Commonwealth of Massachusetts in that State. The plaintiff had in its bonded warehouse the tobacco so ordered in packages to which had been affixed the internal revenue stamps required by law, duly canceled. The aggregate amount of the stamps so canceled was $17.28 and pursuant to the order received the tobacco was delivered about January 19, 1932, to the Boston State Hospital. On the day of shipment the plaintiff sent a bill to the Boston State Hospital in the sum of $30.62, being the price of the tobacco including the tax paid by internal revenue stamps. This bill was paid by the Commonwealth of Massachusetts.

"The tobacco so shipped and received by the hospital was distributed free to patients thereof under the

authority from the law of Massachusetts and in the course of institutional treatment of the patients."

Upon motion of the petitioners the findings were subsequently amplified by the following addition (R. 21):

> "The Boston State Hospital is maintained by the Commonwealth of Massachusetts for care and treatment of those having mental diseases. Institutional treatment of the insane has existed for several centuries although the early treatments were largely limited to the confinement of the violently insane. State treatment of the mentally diseased at public expense has existed in the United States and in the Commonwealth of Massachusetts for many years, but a few States provide practically no such facilities. The Boston State Hospital is useful in the maintenance of public welfare and order in the Commonwealth of Massachusetts. The power of restraining patients is conferred upon the hospital by the State. While there are private hospitals for the care of the insane located and operated in the State, they are conducted for profit and the average patient does not have the means to pay their charges. In the Boston State Hospital, patients pay if they are able, but if not pay nothing. The hospital performs a useful service."

In the case of *Liggett and Myers Tobacco Co.* v. *The United States,* numbered 42,107 in the Court of Claims, the Court of Claims made further findings as follows (R. 22):

> "About January 25, 1932; the plaintiff filed with the Collector of Internal Revenue at St. Louis, Missouri, a claim for the sum of $17.28, the amount of the stamps used in payment of the tax on the tobacco shipped to the hospital, alleging as the basis for the claim that the tax so sought to be recovered was paid by the plaintiff on tobacco sold and delivered by it to the Commonwealth of Massachusetts which was by said State, in pursuance of the laws thereof, distributed without charge to inmates of a State owned and operated insti-

tution as an instrumentality of government. The claim for refund was disallowed."

In the cases of *The Commonwealth of Massachusetts* v. *The United States* and *Liggett and Myers Tobacco Co. on behalf of The Commonwealth of Massachusetts* v. *The United States*, numbered, respectively, 42,411 and 42,412, in the Court of Claims, the Court of Claims made further findings as follows (R. 22):

> "In each of these cases the plaintiff therein filed a claim for refund in due time and in proper form upon substantially the same grounds as were stated in the claim for refund filed in No. 42,107."

**Errors Relied On.**

(1) The Court of Claims erred in holding that the Boston State Hospital, found by the court to be owned, operated and maintained by The Commonwealth of Massachusetts for the care and treatment of those having mental diseases, was not such an instrumentality of State government as is entitled to immunity from taxation by the Federal government.

(2) The Court of Claims erred in holding that this case is not controlled by the principles enunciated by this Court in *Ohio* v. *Helvering*, 292 U. S. 360; *Helvering* v. *Powers*, 293 U. S. 214; and *United States* v. *California*, 297 U. S. 175, and in holding that it was controlled by an unwarranted interpretation of dictum contained in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107.

(3) The Court of Claims erred in not holding that the tax collected in the instant cases could not, by reason of constitutional limitations, apply in the case of tobacco sold to the Commonwealth of Massachusetts for consumption by it through free distribution in institutional treatment in a

hospital owned and operated at public expense by the Commonwealth for the care and treatment of the mentally diseased.

(4) The Court of Claims erred in not holding that the tax collected in the instant cases should have been refunded and in not entering judgment for the plaintiff in one of the pending cases.

**Reasons for Granting the Writs.**

This Court should review the judgments of the Court of Claims in these cases for the reason that they decide a Federal question in a way in conflict with the principles enunciated by this Court in *South Carolina* v. *United States,* 199 U. S. 437; *Clallam County* v. *United States and United States Spruce Production Corporation,* 263 U. S. 341; *Ohio* v. *Helvering,* 292 U. S. 360; *Helvering* v. *Powers,* 293 U. S. 214, and *United States* v. *California,* 297 U. S. 175. The judgments are also in conflict with the decisions of this Court in *McCulloch* v. *Maryland,* 4 Wheat. 316; *Collector* v. *Day,* 11 Wall. 113; *United States* v. *Baltimore & Ohio R. Co.,* 17 Wall. 322; *Pollock* v. *Farmers Loan and Trust Co.,* 157 U. S. 429; *Home Savings Bank* v. *Des Moines,* 205 U. S. 503; *Farmers and Mechanics Savings Bank* v. *Minn.,* 232 U. S. 516; *Gillespie* v. *Oklahoma,* 257 U. S. 501; *Northwestern Mutual Life Insurance Co.* v. *Wisconsin,* 275 U. S. 136; *Panhandle Oil Co.* v. *Knox,* 277 U. S. 218; *Indian Motocycle Co.* v. *United States,* 283 U. S. 570, and *Graves* v. *Texas Company,* U. S. Supreme Court, Law. Ed. Advance Opinions 1935-1936, p. 824.

The principle of immunity of Federal instrumentalities from burden by the States upon the one hand and the immunity of instrumentalities of the State from burden by the Federal government upon the other is well established.

In the instant cases the levy and collection of a tax upon tobacco sold to the Commonwealth of Massachusetts imposed a direct burden upon it. The principle upon which the decision in *Indian Motocycle Co.* v. *United States, supra,* rests extends to the imposition here involved. But even if the tax in question were not to be regarded as having its incidence in the sale of the tobacco, but rather in the removal for consumption or sale, the case would still be governed by the decision of this Court in *Graves* v. *Texas Company, supra.* The Court of Claims assumes that the test as to whether or not a function performed by a State is entitled to immunity from Federal burden depends upon whether the State alone has capacity to perform it. Such an assumption is without warrant. No decision of this Court has ever so held and the adoption of so narrow a rule is not in accord with the test which this Court in its most recent decisions has indicated should be followed in determining what functions performed by the States will be regarded as immune and what functions will be regarded as not immune. *Ohio* v. *Helvering, Helvering* v. *Powers,* and *United States* v. *California, supra,* all indicate that the test turns upon whether the function is usual, customary or traditional upon the one hand or whether it is upon the other hand a proprietary function whereby the State enters the market place and engages in business which constitutes a departure from usual governmental functions to which the Federal taxing power would normally extend. Even assuming it would not be competent for this Court to take judicial notice of the necessity of the States caring for their insane, the findings of fact by the Court of Claims indicate that the maintenance of such institutions as that here involved are usual, customary and traditional functions of State governments, and that they help to maintain public welfare and order. It is implicit, if not expressly stated

in the findings, that the institution is conducted at public expense and not for profit nor as a proprietary enterprise.

If the Court of Claims erred, as is contended, in holding that the function of State government here involved was not of a character entitled to immunity from Federal taxation, it erred in ordering judgments entered for the United States in each of the cases, for the tax here collected could not constitutionally apply to tobacco sold to the Commonwealth for such a function. *McCulloch* v. *Maryland,* 4 Wheat. 316; *Panhandle Oil Co.* v. *Knox,* 277 U. S. 218; *Indian Motocycle Co.* v. *United States,* 283 U. S. 570; *Graves* v. *Texas Company,* U. S. Supreme Court, Law. Ed. Advance Opinions 1935-1936, p. 824.

WHEREFORE, it is respectfully submitted that these petitions should be granted.

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## BRIEF IN SUPPORT OF PETITION.

### Opinion Below.

The opinion of the Court of Claims (R. 23) is reported in 13 F. Supp. 143. See also 14 F. Supp. 543.

### Jurisdiction.

The judgments of the Court of Claims were ordered to be entered April 6, 1936 (R. 26-27), and the motions for new trial were denied June 9, 1936 (R. 27). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925 (43 Stat. 939); United States Code Annotated, Sec. 288.

### Question Presented, Statute Involved, Specification of Errors and Statement of the Cases.

A statement of the question presented, the statute involved, the specification of errors to be urged, and a statement of the cases will be found in the foregoing petition.

### Argument.

The decision of the Court of Claims in the cases at bar rested solely upon the ground that the function performed by The Commonwealth of Massachusetts through the instrumentality of the Boston State Hospital is not of such a character as to entitle the Commonwealth to immunity from Federal taxation with respect to it. Having found as a matter of fact that the institution involved is owned and maintained by the Commonwealth for the care and treatment of those having mental diseases and that it is useful in the maintenance of public welfare and order in the Commonwealth, the court ruled as a matter of law, in the last

paragraph of its opinion, that the institution "not being essential to the execution of the governmental functions of the State and not one which the State only could carry on, it follows that no immunity from taxation has been established." The court relies upon the following dictum in the case of *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 172, as supporting its conclusion: "The true distinction is between the attempted taxation of those operations of the States essential to the execution of its governmental functions, and which the State can only do itself, and those activities which are of a private character." The Court of Claims sets forth in italics the words "and which the State can only do itself." It is submitted that in the first place the quoted language is pure dictum and in the second place the conclusion reached by the Court of Claims is unsupported even by the dictum when interpreted in the light of the entire context. The phrase set forth in italics by the Court of Claims was not essential to the decision in the case of *Flint* v. *Stone Tracy Co., supra.* All that was actually held by the Supreme Court with respect to this particular aspect of the case was simply that certain public service corporations neither owned nor managed by a State and engaged in business with a view to private gain were not immune from Federal taxation even though performing functions of a quasi-public character. Moreover, it is unreasonable to suppose that the portion of the dictum italicized by the Court of Claims was intended to be read alone and to be construed so narrowly as to mean that if a function performed by a State is of such a character that it is physically or constitutionally possible for the State to leave it unperformed, then no matter how customary and well established as a function of government it may be, the State is entitled to no immunity with respect to it. Such a construction loses sight of the con-

trasting classification referred to by the Supreme Court in the same sentence as "those activities which are of a private character" and leaves a large residuum of functions that would fall into neither classification outlined as the rule of distinction in the dictum. Even were such an improbably narrow construction assumed, it is submitted that it would be error to consider that the basic function of protecting society from the acts of the insane is unnecessary. The State alone has the power to confine. It is a matter of common knowledge that in the development of the basic objective greater emphasis has come to be laid upon the care and treatment of the insane, now often referred to as the mentally diseased, so that mere confinement no longer obtains among civilized peoples. But the need for the accomplishment of the basic purpose is none the less great.

But, however this may be, it is submitted that the decisions of this Court, and particularly the more recent decisions, indicate that so narrow a limitation is not to be adopted. These cases point to the test as being between the usual and customary functions of government upon the one hand and those, upon the other hand, of a proprietary nature where the State invades the market place or fields customarily occupied by private enterprise. In *Ohio* v. *Helvering*, 292 U. S. 360 at page 369, this Court says: "When a State enters the market place seeking customers it divests itself of its quasi-sovereignty *pro tanto* and takes on the character of a trader, so far, at least, as the taxing power of the Federal government is concerned." Again, in the case of *Helvering* v. *Powers*, 293 U. S. 214 at page 225, this Court indicates that the test is whether the State is withdrawing "sources of revenue from the Federal taxing power by engaging in businesses which constitute a departure from usual governmental functions

and to which, by reason of their nature, the Federal taxing power would normally extend." Again, in *United States* v. *California*, 297 U. S. 175 at page 184, this Court says:

> "The analogy of the constitutional immunity of state instrumentalities from federal taxation, on which respondent relies, is not illuminating. That immunity is implied from the nature of our federal system and the relationship within it of state and national governments, and is equally a restriction on taxation by either of the instrumentalities of the other. Its nature requires that it be so construed as to allow to each government reasonable scope for its taxing power, see Metcalf & Eddy *v.* Mitchell, 269 U. S. 514, 522-524, which would be unduly curtailed if either by extending its activities could withdraw from the taxing power of the other subjects of taxation traditionally within it. Helvering *v.* Powers, 293 U. S. 214, 225; Ohio *v.* Helvering, 292 U. S. 360; South Carolina *v.* United States, 199 U. S. 437; see Murray *v.* Wilson Distilling Co., 213 U. S. 151, 173, explaining South Carolina *v.* United States, *supra*. Hence we look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized by Congress than can an individual."

Obviously the issue in the instant cases involves "immunity of State instrumentalities from Federal taxation", not "the plenary power to regulate commerce", and the rule indicated by this Court as applying to cases involving the former subject matter is applicable in the instant cases.

Moreover, it is amply clear that, in the application of the rule of immunity, such immunity has not been denied in cases where the function could conceivably be performed in any other way than through the agency of government.

In the case of *Clallam County* v. *United States and United States Spruce Production Corporation*, 263 U. S. 341, immunity from State taxation was extended to a corporation organized by the United States and engaged in the production of airplane lumber. The lumber so produced was used to make airplanes which in turn were intended for use in the prosecution of the World War. To engage in war is undoubtedly a governmental function. The production of the food, clothing, equipment and even munitions essential for supplying the fighting forces which prosecute the war has in the main been left to private enterprise and this was largely true even of the World War. Certainly it could not be said that the government alone could perform the function of producing spruce lumber for aircraft even if it be assumed that the government, because of the exigencies of the times, thereby secured a supply more expeditiously and at lower cost. If the element of difficulty in procuring an adequate supply of spruce is to be regarded as a material factor, then the State stands in as strong a position in the instant cases as the Federal government in the *Clallam County* case. The practical result of the Commonwealth's failing to maintain such institutions as the one in question would be that hundreds of mad men and women would be loosed upon society. That the State government not only confines but cares for and treats the inmate in a manner consistent with the best thought of the time does not make the function any the less governmental in character. In early times war was prosecuted with ancient weapons such as the javelin. In the prosecution of war today government adopts the most efficient means at its command, as, for instance, the airplane. In early times the State maintained order and protected society within its borders by confining its criminal and its insane in a manner that today would be regarded as cruel and

inhumane. Today more efficient means are adopted for the accomplishment of the same basic objective of maintaining order and protecting society against crime and insanity. Can it be assumed that it is any the less the function of government to protect society from that which menaces it from within its borders than to protect from that which menaces from without?

Again, in the case of *Panhandle Oil Co.* v. *Knox*, 277 U. S. 218, the Supreme Court held invalid a State imposition which bore upon a veterans hospital maintained by the Federal government. Maintenance of a veterans hospital is not essential in the sense that the government alone can maintain it, nor is the care of veterans essential in the sense that the government alone can care for them. Probably their care could be contracted for far more easily than the care of the insane. Moreover, in the case of the insane the State alone has authority to confine and subject to treatment. In this sense the test suggested in the italicized language quoted by the Court of Claims from the case of *Flint* v. *Stone Tracy Co.* indicates that the Boston State Hospital is better qualified for immunity than a veterans hospital.

In *Indian Motocycle Co.* v. *United States*, 283 U. S. 570, the maintenance of law and order by a political subdivision of Massachusetts through the medium of a police force equipped with motorcycles was considered an instrumentality entitled to immunity from Federal taxation. It is submitted that the institution which confines the insane is no less essential to the preservation of order than the officer who might apprehend the insane person if he escaped and return him to the place of confinement.

Even the maintenance of an ordinary hospital for the conservation of the public health has been considered by the great weight of authority to be a governmental function.

*City of McAllen* v. *Gartman*, 81 S. W. (2d) 147, and long list of authorities there cited. Such also was the decision in *Mallory* v. *White*, 8 F. Supp. 989, in which case it was further held that the fact that some of the patients who were able paid the whole or a part of the cost of the service did not prevent the application of the rule of immunity.

Finally, applying the test as outlined in the recent decisions of this Court, it is clear that the function here involved is a customary and usual function of government. Even if this Court were not to take judicial notice of the facts, the Court of Claims has found that the power to restrain the insane is derived from the State, that institutional treatment of the insane has existed for centuries although early treatments were largely limited to the confinement of the violently insane, and that State treatment of the mentally diseased at public expense has existed in the United States and in the Commonwealth for many years. That the institution maintained by the Commonwealth for the insane was not conducted as a proprietary enterprise nor for profit is implicit in the findings of the Court of Claims. It further appears that the tobacco was properly used in the institutional treatment of the patients, no charge being made therefor to the patient. It is accordingly submitted that the Court of Claims erred in ruling that the instrumentality here involved was not of such a nature as to entitle the Commonwealth to immunity from Federal taxation with respect to it.

If, as is here contended, the function performed by The Commonwealth of Massachusetts in the care of the insane is entitled to immunity from Federal taxation, the question which the Court of Claims did not find it material to determine, namely, whether the rule of immunity was violated by the particular tax here collected, becomes material. It is submitted that the rule was so violated.

It is well established that on the one hand a State may not burden Federal instrumentalities nor may the Federal government, on the other hand, burden the instrumentalities of the States. *McCulloch* v. *Maryland*, 4 Wheat. 316; *Collector* v. *Day*, 11 Wall. 113; *United States* v. *Baltimore & Ohio R. Co.*, 17 Wall. 322; *Pollock* v. *Farmers Loan & Trust Co.*, 157 U. S. 429; *Home Savings Bank* v. *Des Moines*, 205 U. S. 503; *Farmers and Mechanics Savings Bank* v. *Minnesota*, 232 U. S. 516; *Gillespie* v. *Oklahoma*, 257 U. S. 501; *Northwestern Mutual Life Insurance Co.* v. *Wisconsin*, 275 U. S. 136; *Panhandle Oil Co.* v. *Knox*, 277 U. S. 218; *Indian Motocycle Co.* v. *United States*, 283 U. S. 570.

The statute under which the tax was paid imposes a tax upon "all tobacco and snuff manufactured in or imported into the United States, and sold by the manufacturer or importer, or removed for consumption or sale". It is clear that no tax is to be imposed upon mere manufacture or importation under the statute. The terms "manufactured" and "imported" are descriptive of the tobacco which when "sold" or "removed for consumption or sale" is subject to the tax. Sale or removal for consumption or sale is an essential element and there can be no incidence of the tax until sale or removal for consumption or sale takes place. In the instant cases, about January 6, 1932, the Liggett and Myers Tobacco Co. received an order from The Commonwealth of Massachusetts, through its purchasing agent, for four boxes of tobacco to be delivered to the Boston State Hospital, owned and operated by The Commonwealth of Massachusetts in that State. The Liggett and Myers Tobacco Co. had in its bonded warehouse the tobacco so ordered in packages to which had been affixed the internal revenue stamps required by law, duly canceled. The aggregate amount of the stamps so canceled was $17.28, and pursuant to the order received the tobacco

was delivered about January 19, 1932, to the Boston State Hospital. On the day of shipment the Liggett and Myers Tobacco Co. sent a bill to the Boston State Hospital in the sum of $30.62, being the price of the tobacco including the tax paid by internal revenue stamps. This bill was paid by The Commonwealth of Massachusetts. The date of affixation of stamps relates solely to the payment of the tax and is without significance as to its incidence. The stamps had been affixed prior to either sale or removal and such affixation may have been in anticipation either of sale or removal for consumption or sale. The coincident act of removal and shipment completed the sale. The case is within the principle laid down in the case of *Indian Motocycle Co.* v. *United States,* 283 U. S. 570. In that case it was held that the sale of an article to a State agency for use in its police service was not subject to taxation by the United States. This Court there said, at page 579: "The maintenance of a police service by such a State agency, like the maintenance of a Coast Guard service by the United States, is a governmental function; and that function extends—in one instance as much as in the other—to the purchase of equipment and supplies needed to render the particular service efficient. Under the constitutional principle the exertion of such a function by a State or a State agency has the same immunity from Federal taxation that like exertions by the United States or its agencies have from State taxation. Here the tax is laid directly on the sale to a governmental State agency of an article purchased for governmental purposes. The sale and purchase constitute a single transaction, in which the purchaser is an essential participant. Without that participation the sale could not be effected. Thus, the transaction falls within the class which the United States cannot tax consistently with the constitutional principle." As was said in *Panhandle Oil Co.* v. *Knox,* 277 U. S. 218, at page 222,

and reiterated in the *Indian Motocycle Co.* case at page 578: "It is immaterial that the seller and not the purchaser is required to report and make payment to the State. Sale and purchase constitute a transaction by which the tax is measured and on which the burden rests." Shipment of the tobacco pursuant to the order received from The Commonwealth of Massachusetts necessitated payment of the tax. The effect of the imposition upon the purchaser of the tobacco was accordingly direct and in this instance, the purchaser being The Commonwealth of Massachusetts, it is submitted that the levy was invalid.

It was contended by the respondent in argument before the Court of Claims that the tax invariably had its incidence in removal, never in sale, and the practice to require affixation of stamps only upon removal was cited. So distorted an interpretation of the express language of the taxing act is without warrant. The law expressly lays a tax on sale as well as on removal for consumption or sale and any Federal practice which deliberately ignores the laying of the tax on the sale or that ignores the fact that the statute imposes the tax upon removal, only when the removal is for consumption or sale, would have no effect upon the interpretation of the statute. The language of the statute is clear. There is no ambiguity in it. Departmental practice, no matter how long established, cannot make the law but can only throw light upon the law where there is uncertainty in the language employed by the law-making body. *Louisville and N. R. Co.* v. *United States,* 282 U. S. 740; *Robinson* v. *Lundrigan,* 227 U. S. 173; *United States* v. *Finnell,* 185 U. S. 236; *United States* v. *Tanner,* 147 U. S. 661. If it be the contention of the Federal Government that the excise is imposed on the bare act of "removal" or shifting of goods from one portion of the owner's premises to another, it might well be questioned whether such an arbitrary basis for an excise could con-

stitutionally be sustained, and certainly as a matter of construction of the Federal statute laying the excise such an interpretation is entirely without warrant. Admittedly a State may constitutionally lay a tax upon the storage and removal from storage of gasoline even though that gasoline is subsequently used as motor fuel in interstate commerce. *Edelman* v. *Boeing Air Transport,* 289 U. S. 249. In the *Edelman* case this Court expressly refrained from construing the statute involved and dealt solely with the question of constitutionality of the statute as construed. It held that storage and removal from storage were incidents of ownership and as the State had the right to tax the property itself so it could tax the incident of ownership. But it has never been the practice nor the policy of the Federal government to invade the field of direct property taxation. The whole history of the levy involved in the instant cases indicates it is and always has been an excise aimed at sale or consumption and not ownership. The express language of the act itself contradicts the contention that the excise is laid on the bare act of removal or that it is laid on storage. No mention is made of storage in the act nor does the statute purport to lay any tax on the bare act of "removal". The tax is laid on tobacco "sold" or "removed for consumption or sale". From the very earliest days the excise upon tobacco and tobacco products has been recognized to be a levy intended to be borne by the purchaser and consumer and not by the manufacturer or importer. The law enacted June 5, 1794, laid an excise on snuff and on sugar. Even though that portion of the levy which was laid with respect to sugar made no express mention of *sale* or removal for *consumption or sale,* Chief Justice Marshall, in *Pennington* v. *Coxe,* 2 Cranch 33, nevertheless construed the excise as one falling upon the consumer. Obviously, the present statute which expressly mentions "sale" and removal "for consumption

or sale" is even stronger in its indication of intent to place the burden upon the consumer. This intention is further indicated, if further indication be necessary, by the fact that where tobacco is to be exported and not consumed in this country express provision is made for exemption. U. S. Code, Title 26, Sections 785, 786, 787 and 788.

The recent case of *Trinity Farm Construction Co.* v. *Alice Lee Grosjean*, 291 U. S. 466, is clearly distinguishable from the instant cases. In the *Trinity Farm* case the user is the individual contractor, not the government. In the *Trinity Farm* case the government is neither the purchaser nor the user. In the instant cases the Commonwealth is both the purchaser and the consumer.

Whether or not the tax in the instant cases had its incidence in sale or in removal for consumption or sale, the burden is nevertheless direct. Manufacturing cost is determined and the price fixed when the tobacco tax impinges. The stamp tax is added to the price when the tobacco is sold. It does not form a part of the cost of production. If the tobacco were never sold nor removed for consumption or sale the tax would never be incurred. It in no sense forms a part of manufacturing cost nor can there be any doubt as a practical matter but what the Commonwealth, if the type of transaction in question is not taxable, can procure its tobacco for approximately half what it would pay if the tax must be paid. It is idle to talk about the remoteness of the tax when the obvious fact is, and judged by every rule of reason it must be, that the Commonwealth is in substance bearing it. No seller of tobacco could asume any such burden and survive. In the instant cases it would leave the company nothing for its tobacco if it bore the tax. It is perfectly apparent that the company selling the tobacco must increase its price by substantially if not precisely the amount of the tax and the purchaser is thereby directly affected. It is equally clear that

the Commonwealth could and would refuse to buy of any seller of tobacco that did not recognize that if the transaction were untaxed the amount of the tax should be eliminated so that the cost to the Commonwealth for tobacco would be that much below the customary price to others in transactions not tax free. The likelihood that substantially the whole, if not the whole, of the burden of the imposition will fall upon the State instrumentality goes to the very root and essence of the principle involved. It would be hard to conceive of any Federal tax that can be regarded as imposing a burden upon the Commonwealth, short of a direct levy upon it *per se*, if the levy involved in this case were not to be so regarded.

In *Graves* v. *Texas Co.*, decided by this Court May 18, 1936, U. S. Supreme Court, Law. Ed. Advance Opinions 1935-1936, page 824, this principle is clearly recognized. In that case a tax by the State of Alabama construed to be upon storing and withdrawing was held to be unconstitutional in respect to gasoline withdrawn for the purpose of sale to the United States for use in performing governmental functions. Indeed this Court went further and said, Lawyers Edition, page 827:

> "But, assuming that, by the Acts under consideration the State meant to tax mere storing, that purpose cannot be given effect in respect of the company's sales and deliveries to the United States without infringing the constitutional principle which safeguards the federal government against state taxation. Plainly, the sales and deliveries by the company to the United States necessarily include storing and withdrawal from storage. A tax upon anything so essential to the sale of the gasoline to the United States is as objectionable as would be a tax upon the sale itself. The validity of the tax is to be determined by the practical effect of enforcement. To apply any other test of constitutionality would be to treat 'a prohibition which

is general as if it were confined to a particular mode of doing the forbidden thing.' Brown *v.* Maryland, 12 Wheat. 419, 444, 6 L. Ed. 678, 687. As held in the Panhandle Oil Co. case (277 U. S. 222, 72 L. Ed. 858, 48 S. Ct. 451, 56 A. L. R. 583): 'A charge at the prescribed rate is made on account of every gallon acquired by the United States. It is immaterial that the seller and not the purchaser is required to report and make payment to the State. * * * The amount of money claimed by the State rises and falls precisely as does the quantity of gasoline so secured by the Government. It depends immediately upon the number of gallons.' So far as concerns the federal immunity from state taxation, a tax upon storing or withdrawal so involved cannot be distinguished from the tax on sales imposed by the Mississippi statute condemned as unconstitutional."

**Conclusion.**

It is respectfully submitted that the cases at bar are controlled by, and the decision of the Court of Claims below is opposed to, the decisions of this Court relied upon by the petitioners in the foregoing brief as therein set forth. If not, the case involves an important question of law which has not been but should be settled by this Court. For either reason, the petition for writs of certiorari to the Court of Claims to review these judgments should be granted.

Respectfully,

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FILED
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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1936**

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# No. 161

LIGGETT AND MYERS TOBACCO CO.,
*Petitioner,*

*vs.*

THE UNITED STATES.

# No. 162

THE COMMONWEALTH OF MASSACHUSETTS,
*Petitioner,*

*vs.*

THE UNITED STATES.

# No. 163

LIGGETT AND MYERS TOBACCO CO., ON BEHALF OF THE COMMONWEALTH OF MASSACHUSETTS,
*Petitioner,*

*vs.*

THE UNITED STATES.

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## BRIEF FOR PETITIONERS.

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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1936**

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# No. 161

LIGGETT AND MYERS TOBACCO CO.,

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## BRIEF FOR PETITIONERS.

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### Opinion Below.

The opinion of the Court of Claims (R. 23) is reported in 13 F. Supp. 143. See also 14 F. Supp. 543.

## Jurisdiction.

The judgments of the Court of Claims were ordered to be entered April 6, 1936 (R. 26–27), and the motions for new trial were denied June 9, 1936 (R. 27). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925 (43 Stat. 939); United States Code annotated, Sec. 288.

## Question Presented.

The principal question presented is whether the tax imposed by the Federal Revenue Act of 1926 in Section 401 upon tobacco sold by the manufacturer or removed for consumption or sale could, under constitutional limitations, apply to tobacco sold by the manufacturer to The Commonwealth of Massachusetts for free distribution in institutional treatment of the inmates of an insane hospital owned and operated by the Commonwealth.

## Statute Involved.

The principal portion of the Revenue Act of 1926 involved is Section 401 (a) (U. S. Code, Title 26, Sec. 761) which reads as follows: "Upon l tobacco and snuff manufactured in or imported into the United States, and sold by the manufacturer or importer, or removed for consumption or sale, there shall be levied, collected, and paid a tax of 18 cents per pound, to be paid by the manufacturer or importer thereof. Snuff flour when sold or removed for use or consumption shall be taxed as snuff and shall be put up in packages and stamped in the same manner as snuff." Other provisions relative to the tax upon tobacco are to be found in Chapter 14 of Title 26 of the U. S. Code.

## Statement.

The Court of Claims made the following special findings of fact (R. 20):

> "The Liggett and Myers Tobacco Company is a corporation engaged in the business of dealing in and manufacturing tobacco and pursuant to law maintains a bonded warehouse for storing manufactured tobacco. The established internal-revenue procedure was to affix the stamps required by law to be placed upon the manufactured tobacco before the tobacco was removed from the factory. About January 6, 1932, the plaintiff (Liggett and Myers) received an order from the Commonwealth of Massachusetts, through its purchasing agent, for four boxes of manufactured tobacco totaling ninety-six pounds net weight to be delivered to the Boston State Hospital, owned and operated by the Commonwealth of Massachusetts in that State. The plaintiff had in its bonded warehouse the tobacco so ordered in packages to which had been affixed the internal revenue stamps required by law, duly canceled. The aggregate amount of the stamps so canceled was $17.28 and pursuant to the order received the tobacco was delivered about January 19, 1932, to the Boston State Hospital. On the day of shipment the plaintiff sent a bill to the Boston State Hospital in the sum of $30.62, being the price of the tobacco including the tax paid by internal revenue stamps. This bill was paid by the Commonwealth of Massachusetts.
>
> "The tobacco so shipped and received by the hospital was distributed free to patients thereof under the authority from the law of Massachusetts and in the course of institutional treatment of the patients."

Upon motion of the petitioners the findings were subsequently amplified by the following addition (R. 21):

> "The Boston State Hospital is maintained by the Commonwealth of Massachusetts for care and treatment of those having mental diseases. Institutional treatment of the insane has existed for several centuries although the early treatments were largely limited to the confinement of the violently insane. State treatment of the

mentally diseased at public expense has existed in the United States and in the Commonwealth of Massachusetts for many years, but a few States provide practically no such facilities. The Boston State Hospital is useful in the maintenance of public welfare and order in the Commonwealth of Massachusetts. The power of restraining patients is conferred upon the hospital by the State. While there are private hospitals for the care of the insane located and operated in the State, they are conducted for profit and the average patient does not have the means to pay their charges. In the Boston State Hospital, patients pay if they are able, but if not pay nothing. The hospital performs a useful service."

In the case of *Liggett and Myers Tobacco Co.* v. *The United States*, numbered 42,107 in the Court of Claims, the Court of Claims made further findings as follows (R. 22):

"About January 25, 1932, the plaintiff filed with the Collector of Internal Revenue at St. Louis, Missouri, a claim for the sum of $17.28, the amount of the stamps used in payment of the tax on the tobacco shipped to the hospital, alleging as the basis for the claim that the tax so sought to be recovered was paid by the plaintiff on tobacco sold and delivered by it to the Commonwealth of Massachusetts which was by said State, in pursuance of the laws thereof, distributed without charge to inmates of a State owned and operated institution as an instrumentality of government. The claim for refund was disallowed."

In the cases of *The Commonwealth of Massachusetts* v. *The United States* and *Liggett and Myers Tobacco Co. on behalf of The Commonwealth of Massachusetts* v. *The United States*, numbered respectively, 42,411 and 42,412 in the Court of Claims, the Court of Claims made further findings as follows (R. 22):

"In each of these cases the plaintiff therein filed a claim for refund in due time and in proper form upon substantially the same grounds as were stated in the claim for refund filed in No. 42,107."

**Errors Relied On.**

(1) The Court of Claims erred in holding that the Boston State Hospital, found by the court to be owned, operated and maintained by The Commonwealth of Massachusetts for the care and treatment of those having mental diseases, was not such an instrumentality of State government as is entitled to immunity from taxation by the Federal government.

(2) The Court of Claims erred in holding that this case is not controlled by the principles enunciated by this Court in *Ohio* v. *Helvering*, 292 U. S. 360; *Helvering* v. *Powers*, 293 U. S. 214; and *United States* v. *California*, 297 U. S. 175, and in holding that it was controlled by an unwarranted interpretation of dictum contained in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107.

(3) The Court of Claims erred in not holding that the tax collected in the instant cases could not, by reason of constitutional limitations, apply in the case of tobacco sold to the Commonwealth of Massachusetts for consumption by it through free distribution in institutional treatment in a hospital owned and operated at public expense by the Commonwealth for the care and treatment of the mentally diseased.

(4) The Court of Claims erred in not holding that the tax collected in the instant cases should have been refunded and in not entering judgment for the plaintiff in one of the pending cases.

**Argument.**

The decision of the Court of Claims in the cases at bar rested solely upon the ground that the function performed by The Commonwealth of Massachusetts through the instrumentality of the Boston State Hospital is not of such a character as to entitle the Commonwealth to immunity from Federal taxation with respect to it. Having found as a matter of fact that the institution involved is owned and maintained

by the Commonwealth for the care and treatment of those having mental diseases and that it is useful in the maintenance of public welfare and order in the Commonwealth, the court ruled as a matter of law, in the last paragraph of its opinion, that the institution "not being essential to the execution of the governmental functions of the State and not one which the State only could carry on, it follows that no immunity from taxation has been established."

The court below in support of this conclusion cites several decisions of this Court which it is submitted do not sustain such conclusion. The case of *South Carolina* v. *United States*, 199 U. S. 437, so cited held that when South Carolina went into the business of dispensing liquor such business departed from ordinary governmental functions, invaded the field of private business and accordingly was not entitled to immunity from federal taxation. The conduct of a liquor business by a state is in no way comparable to the maintenance of an institution for the confinement, care and treatment of the insane at public expense and for the manifest protection of society, nor is there anything in the South Carolina case to indicate that the Supreme Court would not regard the maintenance of such an institution as an instrumentality of a "strictly governmental character". Indeed the very passage quoted by the Court of Claims from the case of *South Carolina* v. *United States* at page 461 to the effect that the prevailing rule was indicated by that case to be:

> "* * * the exemption of State agencies and instrumentalities from national taxation is limited to those which are of a strictly governmental character, and does not extend to those which are used by the State in the carrying on of an ordinary private business"

clearly indicates that the contrast made by the Supreme Court was between agencies or instrumentalities of a strictly governmental character on the one hand and those used in the

carrying on of an ordinary private business on the other hand.

As interpretative of what is meant by the term "strictly governmental character" the court below quotes from *Metcalf & Eddy* v. *Mitchell*, saying "In other words, as stated in *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 522, while the line cannot be drawn in terms of universal application, the Supreme Court has repeatedly held that those agencies through which either [State or Federal] government *immediately and directly exercises its sovereign powers*, are immune from the taxing power of the other.' (Italics ours.)" This case involved only the question as to whether a mere contractor with a state not found to be an employee of it was exempt from the federal income tax under the War Revenue Act of 1913 on the sum received under the contract with the state. The connection with the state function was held to be too remote to render unconstitutional the application of the levy to the net income of the contractor. No question was presented as to whether the nature of the function in connection with which the contract was made was of a governmental character. The language quoted by the court below was pure dictum in so far as it is relied on to define what functions which may be performed by government are entitled to immunity and what functions so performed are not entitled to immunity. Nor is there anything in the language quoted to indicate that the Supreme Court intended to lay emphasis upon the word "sovereign" or to indicate what are sovereign powers and what are not or to indicate that the term "sovereign powers" is any more restrictive than the term "strictly governmental powers". It might mean powers that are in fact exercised by a particular sovereign or powers that can only be exercised by that sovereign or powers that it is customary and usual for that sovereign to exercise. Nothing in the case indicates with what significance the term was used nor was it essential to the disposition of the case that such indication should be

made. Subsequent cases hereinafter referred to, however, do throw light upon this question as will be specifically pointed out.

But the main reliance of the court below appears to be in the following dictum, which it quotes, from the case of *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 172: "The true distinction is between the attempted taxation of those operations of the States essential to the execution of its governmental functions, and which the State can only do itself, and those activities which are of a private character." The Court of Claims sets forth in italics the words "and which the State can only do itself." It is submitted that in the first place the quoted language is pure dictum and in the second place the conclusion reached by the Court of Claims is unsupported even by the dictum when interpreted in the light of the entire context. The phrase set forth in italics by the Court of Claims was not essential to the decision in the case of *Flint* v. *Stone Tracy Co.*, *supra*. All that was actually held by the Supreme Court with respect to this particular aspect of the case was simply that certain public service corporations neither owned nor managed by a State and engaged in business with a view to private gain were not immune from Federal taxation even though performing functions of a quasi-public character. Moreover, it is unreasonable to suppose that the portion of the dictum italicized by the Court of Claims was intended to be read alone and to be construed so narrowly as to mean that if a function performed by a State is of such a character that it is physically or constitutionally possible for the State to leave it unperformed, then no matter how customary and well established as a function of government it may be, the State is entitled to no immunity with respect to it. Such a construction loses sight of the contrasting classification referred to by the Supreme Court in the same sentence as "those activities which are of a private character" and leaves a large residuum of functions that would fall into neither classification outlined

as the rule of distinction in the dictum. Even were such an improbably narrow construction assumed, it is submitted that it would be error to consider that the basic function of protecting society from the acts of the insane is unnecessary. The State alone has the power to confine. It is a matter of common knowledge that in the development of the basic objective greater emphasis has come to be laid upon the care and treatment of the insane, now often referred to as the mentally diseased, so that mere confinement no longer obtains among civilized peoples. But the need for the accomplishment of the basic purpose is none the less great.

But, however this may be, it is submitted that the decisions of this Court, and particularly the more recent decisions, indicate that so narrow a limitation is not to be adopted. These cases point to the test as being between the usual and customary functions of government upon the one hand and those, upon the other hand, of a proprietary nature where the State invades the market place or fields customarily occupied by private enterprise. In *Ohio* v. *Helvering*, 292 U. S. 360 in which the immunity of state operated liquor stores from federal taxation was involved, this Court at page 368 says "Whenever a state engages in a business of a private nature it exercises non-governmental functions, and the business, though conducted by the state, is not immune from the exercise of the power of taxation which the Constitution vests in the Congress." And continuing at page 369, this Court says: "When a State enters the market place seeking customers it divests itself of its quasi-sovereignty *pro tanto* and takes on the character of a trader, so far, at least, as the taxing power of the Federal government is concerned."

This same line of distinction is adhered to in *Helvering* v. *Powers*, 293 U. S. 214. In that case Chief Justice Hughes, speaking for the court, denies the power of the Commissioner of Internal Revenue to limit the provisions of a particular statute or define the boundaries of their constitutional appli-

cation by a regulation to the effect that exemption from taxation extends to compensation paid by a state to its employees only in case the services are rendered "in connection with the exercise of an essential governmental function". At page 224 this court says: "But the Treasury Department could not by its regulation either limit the provisions of the statute or define the boundaries of their constitutional application". The test is not necessarily whether the governmental function is "essential". As is pointed out by the Chief Justice in the Powers case, the test is to be applied bearing in mind the reason which gave rise to the immunity, — to wit, the necessary protection of the independence of the national and state governments within their respective spheres under our constitutional system. The test accordingly is whether the state is withdrawing "sources of revenue from the federal taxing power by engaging in businesses which constitute a departure from usual governmental functions and to which, by reason of their nature, the federal taxing power would normally extend". *Helvering* v. *Powers*, *ante*, page 225.

Again, in *United States* v. *California*, 297 U. S. 175 at page 184, this Court says:

> "The analogy of the constitutional immunity of state instrumentalities from federal taxation, on which respondent relies, is not illuminating. That immunity is implied from the nature of our federal system and the relationship within it of state and national governments, and is equally a restriction on taxation by either of the instrumentalities of the other. Its nature requires that it be so construed as to allow to each government reasonable scope for its taxing power, see Metcalf & Eddy *v.* Mitchell, 269 U. S. 514, 522–524, which would be unduly curtailed if either by extending its activities could withdraw from the taxing power of the other subjects of taxation traditionally within it. Helvering *v.* Powers, 293 U. S. 214, 225; Ohio *v.* Helvering, 292 U. S. 360; South Carolina *v.* United States, 199 U. S. 437; see Murray *v.*

> Wilson Distilling Co. 213 U. S. 151, 173, explaining South Carolina *v.* United States, *supra.* Hence we look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized by Congress than can an individual."

Obviously the issue in the instant cases involves "immunity of state instrumentalities from federal taxation", not "the plenary power to regulate commerce", and the rule indicated by this Court as applying to cases involving the former subject matter is applicable in the instant cases.

Moreover, it is amply clear that, in the application of the rule of immunity, such immunity has not been denied in cases where the function could conceivably be performed in any other way than through the agency of government. In the case of *Clallam County* v. *United States and United States Spruce Production Corporation*, 263 U. S. 341, immunity from State taxation was extended to a corporation organized by the United States and engaged in the production of airplane lumber. The lumber so produced was used to make airplanes which in turn were intended for use in the prosecution of the World War. To engage in war is undoubtedly a governmental function. The production of the food, clothing, equipment and even munitions essential for supplying the fighting forces which prosecute the war has in the main been left to private enterprise and this was largely true even of the World War. Certainly it could not be said that the government alone could perform the function of producing spruce lumber for aircraft even if it be assumed that the government, because of the exigencies of the times, thereby secured a supply more expeditiously and at lower cost. If the element of difficulty in procuring an adequate supply of spruce is to be regarded as a material factor, then the State stands in as strong a position in the instant cases as the Federal govern-

ment in the *Clallam County* case. The practical result of the Commonwealth's failing to maintain such institutions as the one in question would be that hundreds of mad men and women would be loosed upon society. That the State government not only confines but cares for and treats the inmate in a manner consistent with the best thought of the times does not make the function any the less governmental in character. In early times war was prosecuted with ancient weapons such as the javelin. In the prosecution of war today government adopts the most efficient means at its command, as, for instance, the airplane. In early times the State maintained order and protected society within its borders by confining its criminal and its insane in a manner that today would be regarded as cruel and inhumane. Today more efficient means are adopted for the accomplishment of the same basic objective of maintaining order and protecting society against crime and insanity. Can it be assumed that it is any the less the function of government to protect society from that which menaces it from within its borders than to protect from that which menaces from without?

Again, in the case of *Panhandle Oil Co.* v. *Knox*, 277 U. S. 218, the Supreme Court held invalid a State imposition which bore upon a veterans hospital maintained by the Federal government. Maintenance of a veterans hospital is not essential in the sense that the government alone can maintain it, nor is the care of veterans essential in the sense that the government alone can care for them. Probably their care could be contracted for far more easily than the care of the insane. Moreover, in the case of the insane the State alone has authority to confine and subject to treatment. In this sense the test suggested in the italicized language quoted by the Court of Claims from the case of *Flint* v. *Stone Tracy Co.* indicates that the Boston State Hospital is better qualified for immunity than a veterans hospital.

In *Indian Motocycle Co.* v. *United States*, 283 U. S. 570, the

maintenance of law and order by a political subdivision of Massachusetts through the medium of a police force equipped with motorcycles was considered an instrumentality entitled to immunity from Federal taxation. It is submitted that the institution which confines the insane is no less essential to the preservation of order than the officer who might apprehend the insane person if he escaped and return him to the place of confinement.

Even the maintenance of an ordinary hospital for the conservation of the public health has been considered by the great weight of authority to be a governmental function. *City of McAllen* v. *Gartman*, 81 S. W. (2d) 147, and long list of authorities there cited. Such also was the decision in *Mallory* v. *White*, 8 F. Supp. 989, in which case it was further held that the fact that some of the patients who were able paid the whole or a part of the cost of the service did not prevent the application of the rule of immunity. See also *Orlando* v. *Brockton*, decided by Supreme Judicial Court of Massachusetts September 11, 1936, Mass. Adv. Sheets, 1725, at pages 1728, 1729; *Bolster* v. *Lawrence*, 225 Mass. 387, 391, 392, and cases there cited. Even casual analysis of the nature and scope of the various ordinary activities of states, including their political subdivisions, and their expenditures therefor would demonstrate that so narrow a construction of the rule of immunity as is suggested by the court below would leave exposed to taxation the major portion of these activities and from a practical point of view largely defeat the doctrine under which protection is accorded the independence of the national and state governments in their respective spheres.

Finally, applying the test as outlined in the recent decisions of this Court, it is clear that the function here involved is a customary and usual function of government. Even if this Court were not to take judicial notice of the facts, the Court of Claims has found that the power to restrain the insane is derived from the State, that institutional treatment of the

insane has existed for centuries although early treatments were largely limited to the confinement of the violently insane, and that State treatment of the mentally diseased at public expense has existed in the United States and in the Commonwealth for many years. That the institution maintained by the Commonwealth for the insane was not conducted as a proprietary enterprise nor for profit is implicit in the findings of the Court of Claims. It further appears that the tobacco was properly used in the institutional treatment of the patients, no charge being made therefor to the patient. It is accordingly submitted that the Court of Claims erred in ruling that the instrumentality here involved was not of such a nature as to entitle the Commonwealth to immunity from Federal taxation with respect to it.

If, as is here contended, the function performed by The Commonwealth of Massachusetts in the care of the insane is entitled to immunity from Federal taxation, the question which the Court of Claims did not find it material to determine, namely, whether the rule of immunity was violated by the particular tax here collected, becomes material. It is submitted that the rule was so violated.

It is well established that on the one hand a State may not burden Federal instrumentalities nor may the Federal government, on the other hand, burden the instrumentalities of the States. *McCulloch* v. *Maryland*, 4 Wheat. 316; *Collector* v. *Day*, 11 Wall. 113; *United States* v. *Baltimore & Ohio R. Co.*, 17 Wall. 322; *Pollock* v. *Farmers Loan & Trust Co.*, 157 U. S. 429; *Home Savings Bank* v. *Des Moines*, 205 U. S. 503; *Farmers and Mechanics Savings Bank* v. *Minnesota*, 232 U. S. 516; *Gillespie* v. *Oklahoma*, 257 U. S. 501; *Northwestern Mutual Life Insurance Co.* v. *Wisconsin*, 275 U. S. 136; *Panhandle Oil Co.* v. *Knox*, 277 U. S. 218; *Indian Motocycle Co.* v. *United States*, 283 U. S. 570.

The statute under which the tax was paid imposes a tax upon "all tobacco and snuff manufactured in or imported

into the United States, and sold by the manufacturer or importer, or removed for consumption or sale". It is clear that no tax is to be imposed upon mere manufacture or importation under the statute. The terms "manufactured" and "imported" are descriptive of the tobacco which when "sold" or "removed for consumption or sale" is subject to the tax. Sale or removal for consumption or sale is an essential element and there can be no incidence of the tax until sale or removal for consumption or sale takes place. In the instant cases, about January 6, 1932, the Liggett and Myers Tobacco Co. received an order from The Commonwealth of Massachusetts, through its purchasing agent, for four boxes of tobacco to be delivered to the Boston State Hospital, owned and operated by The Commonwealth of Massachusetts in that State. The Liggett and Myers Tobacco Co. had in its bonded warehouse the tobacco so ordered in packages to which had been affixed the internal revenue stamps required by law, duly canceled. The aggregate amount of the stamps so canceled was $17.28, and pursuant to the order received the tobacco was delivered about January 19, 1932, to the Boston State Hospital. On the day of shipment the Liggett and Myers Tobacco Co. sent a bill to the Boston State Hospital in the sum of $30.62, being the price of the tobacco including the tax paid by internal revenue stamps. This bill was paid by The Commonwealth of Massachusetts. The date of affixation of stamps relates solely to the payment of the tax and is without significance as to its incidence. The stamps had been affixed prior to either sale or removal and such affixation may have been in anticipation either of sale or removal for consumption or sale. The coincident act of removal and shipment completed the sale. The case is within the principle laid down in the case of *Indian Motocycle Co.* v. *United States*, 283 U. S. 570. In that case it was held that the sale of an article to a State agency for use in its police service was not subject to taxation by the United States.

This Court there said, at page 579: "The maintenance of a police service by such a State agency, like the maintenance of a Coast Guard service by the United States, is a governmental function; and that function extends — in one instance as much as in the other — to the purchase of equipment and supplies needed to render the particular service efficient. Under the constitutional principle the exertion of such a function by a State or a State agency has the same immunity from Federal taxation that like exertions by the United States or its agencies have from State taxation. Here the tax is laid directly on the sale to a governmental State agency of an article purchased for governmental purposes. The sale and purchase constitute a single transaction, in which the purchaser is an essential participant. Without that participation the sale could not be effected. Thus, the transaction falls within the class which the United States cannot tax consistently with the constitutional principle." As was said in *Panhandle Oil Co.* v. *Knox*, 277 U. S. 218, at page 222, and reiterated in the *Indian Motocycle Co.* case at page 578: "It is immaterial that the seller and not the purchaser is required to report and make payment to the State. Sale and purchase constitute a transaction by which the tax is measured and on which the burden rests." Shipment of the tobacco pursuant to the order received from The Commonwealth of Massachusetts necessitated payment of the tax. The effect of the imposition upon the purchaser of the tobacco was accordingly direct and in this instance, the purchaser being The Commonwealth of Massachusetts, it is submitted that the levy was invalid.

It was contended by the respondent in argument before the Court of Claims that the tax invariably had its incidence in removal, never in sale, and the practice to require affixation of stamps only upon removal was cited. So distorted an interpretation of the express language of the taxing act is without warrant. The law expressly lays a tax on sale as well

as on removal for consumption or sale and any Federal practice which deliberately ignores the laying of the tax on the sale or that ignores the fact that the statute imposes the tax upon removal, only when the removal is for consumption or sale, would have no effect upon the interpretation of the statute. The language of the statute is clear. There is no ambiguity in it. Departmental practice, no matter how long established, cannot make the law but can only throw light upon the law where there is uncertainty in the language employed by the lawmaking body. *Louisville and N. R. Co.* v. *United States*, 282 U. S. 740; *Robinson* v. *Lundrigan*, 227 U. S. 173; *United States* v. *Finnell*, 185 U. S. 236; *United States* v. *Tanner*, 147 U. S. 661. If it be the contention of the Federal Government that the excise is imposed on the bare act of "removal" or shifting of goods from one portion of the owner's premises to another, it might well be questioned whether such an arbitrary basis for an excise could constitutionally be sustained, and certainly as a matter of construction of the Federal statute laying the excise such an interpretation is entirely without warrant. Admittedly a State may constitutionally lay a tax upon the storage and removal from storage of gasoline even though that gasoline is subsequently used as motor fuel in interstate commerce. *Edelman* v. *Boeing Air Transport*, 289 U. S. 249. In the *Edelman* case this Court expressly refrained from construing the statute involved and dealt solely with the question of constitutionality of the statute as construed. It held that storage and removal from storage were incidents of ownership and as the State had the right to tax the property itself so it could tax the incident of ownership. But it has never been the practice nor the policy of the Federal government to invade the field of direct property taxation. The whole history of the levy involved in the instant cases indicates it is and always has been an excise aimed at sale or consumption and not ownership. The express language of the act itself contradicts

the contention that the excise is laid on the bare act of removal or that it is laid on storage. No mention is made of storage in the act nor does the statute purport to lay any tax on the bare act of "removal". The tax is laid on tobacco "sold" or "removed for consumption or sale". From the very earliest days the excise upon tobacco and tobacco products has been recognized to be a levy intended to be borne by the purchaser and consumer and not by the manufacturer or importer. The law enacted June 5, 1794, laid an excise on snuff and on sugar. Even though that portion of the levy which was laid with respect to sugar made no express mention of *sale* or removal for *consumption or sale*, Chief Justice Marshall, in *Pennington* v. *Coxe*, 2 Cranch 33, nevertheless construed the excise as one falling upon the consumer. Obviously, the present statute which expressly mentions "sale" and removal "for consumption or sale" is even stronger in its indication of intent to place the burden upon the consumer. This intention is further indicated, if further indication be necessary, by the fact that where tobacco is to be exported and not consumed in this country express provision is made for exemption. U. S. Code, Title 26, Sections 785, 786, 787 and 788.

The recent case of *Trinity Farm Construction Co.* v. *Alice Lee Grosjean*, 291 U. S. 466, is clearly distinguishable from the instant cases. In the *Trinity Farm* case the user is the individual contractor, not the government. In the *Trinity Farm* case the government is neither the purchaser nor the user. In the instant cases the Commonwealth is both the purchaser and the consumer.

Whether or not the tax in the instant cases had its incidence in sale or in removal for consumption or sale, the burden is nevertheless direct. *Cornell* v. *Coyne*, 192 U. S. 418 and *Wheeler Lumber Bridge and Supply Co.* v. *United States*, 281 U. S. 572 are not in point. The distinction was indicated in

*Indian Motocycle Co.* v. *United States*, 283 U. S. 570, hereinbefore discussed. Manufacturing cost is determined and the price fixed when the tobacco tax impinges. The stamp tax is added to the price when the tobacco is sold. It does not form a part of the cost of production. If the tobacco were never sold nor removed for consumption or sale the tax would never be incurred. It in no sense forms a part of manufacturing cost nor can there be any doubt as a practical matter but what the Commonwealth, if the type of transaction in question is not taxable, can procure its tobacco for approximately half what it would pay if the tax must be paid. It is idle to talk about the remoteness of the tax when the obvious fact is, and judged by every rule of reason it must be, that the Commonwealth is in substance bearing it. No seller of tobacco could assume any such burden and survive. In the instant cases it would leave the company nothing for its tobacco if it bore the tax. It is perfectly apparent that the company selling the tobacco must increase its price by substantially if not precisely the amount of the tax and the purchaser is thereby directly affected. It is equally clear that the Commonwealth could and would refuse to buy of any seller of tobacco that did not recognize that if the transaction were untaxed the amount of the tax should be eliminated so that the cost to the Commonwealth for tobacco would be that much below the customary price to others in transactions not tax free. The likelihood that substantially the whole, if not the whole, of the burden of the imposition will fall upon the State instrumentality goes to the very root and essence of the principle involved. It would be hard to conceive of any Federal tax that can be regarded as imposing a burden upon the Commonwealth, short of a direct levy upon it *per se*, if the levy involved in this case were not to be so regarded.

In *Graves* v. *Texas Co.*, decided by this Court May 18, 1936, U. S. Supreme Court, Law. Ed. Advance Opinions 1935–1936,

page 824, this principle is clearly recognized. In that case a tax by the State of Alabama construed to be upon storing and withdrawing was held to be unconstitutional in respect to gasoline withdrawn for the purpose of sale to the United States for use in performing governmental functions. Indeed this Court went further and said, Lawyers Edition, page 827:

> "But, assuming that, by the Acts under consideration the State meant to tax mere storing, that purpose cannot be given effect in respect of the company's sales and deliveries to the United States without infringing the constitutional principle which safeguards the federal government against state taxation. Plainly, the sales and deliveries by the company to the United States necessarily include storing and withdrawal from storage. A tax upon anything so essential to the sale of the gasoline to the United States is as objectionable as would be a tax upon the sale itself. The validity of the tax is to be determined by the practical effect of enforcement. To apply any other test of constitutionality would be to treat 'a prohibition which is general as if it were confined to a particular mode of doing the forbidden thing.' Brown *v.* Maryland, 12 Wheat. 419, 444, 6 L. Ed. 678, 687. As held in the Panhandle Oil Co. case (277 U. S. 222, 72 L. Ed. 858, 48 S. Ct. 451, 56 A. L. R. 583): 'A charge at the prescribed rate is made on account of every gallon acquired by the United States. It is immaterial that the seller and not the purchaser is required to report and make payment to the State. * * * The amount of money claimed by the State rises and falls precisely as does the quantity of gasoline so secured by the Government. It depends immediately upon the number of gallons.' So far as concerns the federal immunity from state taxation, a tax upon storing or withdrawal so involved cannot be distinguished from the tax on sales imposed by the Mississippi statute condemned as unconstitutional."

**Conclusion.**

It is accordingly contended that for the foregoing reasons the court below erred as hereinbefore specified and should be reversed.

Respectfully submitted,

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90235—36

# In the Supreme Court of the United States

OCTOBER TERM, 1936

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No. 161

LIGGETT AND MYERS TOBACCO CO., PETITIONER

*v.*

THE UNITED STATES

---

No. 162

THE COMMONWEALTH OF MASSACHUSETTS, PETITIONER

*v.*

THE UNITED STATES

---

No. 163

LIGGETT AND MYERS TOBACCO CO., ON BEHALF OF THE COMMONWEALTH OF MASSACHUSETTS, PETITIONER

*v.*

THE UNITED STATES

---

*ON PETITION FOR WRITS OF CERTIORARI TO THE COURT OF CLAIMS*

---

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

## OPINION BELOW

The opinion of the court below (R. 20–26) is reported in 13 F. Supp. 143, 14 F. Supp. 543.

## JURISDICTION

The judgments of the court below were entered April 6, 1936 (R. 26–27). Order overruling petitioners' motions for new trial was entered June 9, 1936 (R. 27). The petition for writs of certiorari was filed July 6, 1936 (R. 27). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

## QUESTION PRESENTED

Whether the Boston State Hospital is an essential governmental instrumentality of the Commonwealth of Massachusetts within the implication of the decisions of this Court which hold that the Federal Government may not impose a direct tax burden upon such instrumentalities.

## STATUTE INVOLVED

The tax involved was imposed by Section 401 (a) of the Revenue Act of 1926, c. 27, 44 Stat. 9, as follows:

> Upon all tobacco and snuff manufactured in or imported into the United States, and hereafter sold by the manufacturer or importer, or removed for consumption or sale, there shall be levied, collected, and paid, in lieu of the internal-revenue taxes now imposed thereon by section 401 of the Revenue

Act of 1924, a tax of 18 cents per pound, to be paid by the manufacturer or importer thereof. (U. S. C., Title 26, Secs. 700–701.)

* * * * *

**STATEMENT**

The findings of fact of the Court of Claims (R. 20–22) may be summarized as follows:

On or about January 6, 1932, petitioner, Liggett and Myers Tobacco Co., received an order from the Commonwealth of Massachusetts, through its purchasing agent, for the delivery of four boxes of manufactured tobacco, totalling 96 pounds net weight, to the Boston State Hospital, owned and operated by the Commonwealth of Massachusetts in Boston (R. 21).

The established Internal Revenue practice and procedure was to affix the tobacco tax stamps required by law to be placed upon the manufactured tobacco before the tobacco was removed from the factory (R. 21). The petitioner had, in its bonded warehouse, the tobacco so ordered in packages to which such stamps, duly cancelled, had been affixed. The aggregate amount of the stamps so cancelled was $17.28 (R. 21).

Pursuant to the order received, the tobacco was delivered on about January 19, 1932, to the Boston State Hospital, and on the date of shipment the petitioner, Liggett and Myers Tobacco Co., sent a bill to the Boston State Hospital in the sum of $30.62, representing the price of the tobacco, in-

cluding the tax paid by Internal Revenue stamps. This bill was paid by the Commonwealth of Massachusetts (R. 21). The tobacco so shipped and received by the hospital was distributed free to patients thereof under the authority of the law of Massachusetts and in the course of institutional treatment of the patients (R. 21).

The Boston State Hospital is maintained by the Commonwealth of Massachusetts for care and treatment of those having mental diseases. Institutional treatment of the insane has existed for several centuries, although the early treatments were largely limited to the confinement of the violently insane. State treatment of the mentally diseased, at public expense, has existed in the United States and in the Commonwealth of Massachusetts for many years, but a few States provide practically no such facilities. The Boston State Hospital is useful in the maintenance of public welfare and order in the Commonwealth of Massachusetts and performs a useful service. The power of restraining patients is conferred upon the hospital by the State. While there are private hospitals for the care of the insane, located and operated in the State, they are conducted for profit, and the average patients do not have the means to pay their charges. In the Boston State Hospital, patients pay if they are able, but if not, they pay nothing (R. 22–23).

Claims for refund in the sum of $17.28, the amount of the stamps used in payment of the tax

on the tobacco shipped to the hospital, were filed in due time and in proper form on the ground that the tax sought to be recovered was paid on tobacco sold to the Commonwealth of Massachusetts for use in an institution owned and operated by the State as an instrumentality of government. The claims were duly rejected (R. 22).

Upon the foregoing findings of fact, the Court of Claims found in each of these cases, as a conclusion of law, that petitioners were not entitled to recover, and the petitions were dismissed (R. 22, 23).

## ARGUMENT

The decision below holds that the Boston State Hospital, an institution for confinement and treatment of persons suffering from mental illness, is not such an agency or instrumentality of the State of Massachusetts as to be entitled to an exemption from Federal taxation. The Court of Claims, relying upon *South Carolina* v. *United States,* 199 U. S. 437; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, and *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514, stated its conclusion as follows (R. 26):

> The operation of the hospital not being essential to the execution of the governmental functions of the State and not one which the State only could carry on, it follows that no immunity from taxation has been established * * *.

While there is authority for the principle that only functions which none but a State can carry on

are entitled to exemption from a Federal tax, the decision below may be rested solely upon the ground that the operation of the Boston State Hospital was not a usual or essentially governmental function.

The decisions of this Court indicate that the exemption from Federal taxation extends, at most, to the protection of the States, their agencies and instrumentalities only in the performance of their usual functions—those which are essentially governmental in character. *Flint* v. *Stone Tracy Co.*, 220 U. S. 107; *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514; *Fox Film Corporation* v. *Doyal*, 286 U. S. 123; *Helvering* v. *Powers*, 293 U. S. 214. The fact that a State may be engaged in an activity or function, even if it be to the exclusion of everyone else, will not entitle it to exemption if it is thereby extending its operations beyond the usual and essentially governmental fields. *South Carolina* v. *United States, supra; Ohio* v. *Helvering*, 292 U. S. 360.

In the instant cases the agency of the State is the Boston State Hospital. It does, of course, contribute a very valuable service to the Commonwealth of Massachusetts by providing hospitalization and confinement for the insane. That fact, however, does not put it in the category of usual or essentially governmental functions. Activities of a State which are beneficial to its citizens are innumerable, but desirability is not the test. A general state hospital for treatment of all diseases

would be even more desirable, but it would clearly be not entitled to exemption. This hospital is, as the general hospital would be, in competition with private hospitals carrying on the same functions (R. 21). It is true that a large proportion of its patients are charity patients, but it does have a substantial number of patients who pay (R. 21). The hospital is not, it should be noted, a place of confinement for the criminally insane, but rather a place of institutional treatment for the mentally deranged, similar to a sanitarium for tubercular patients. It is submitted, therefore, that the conduct of a hospital such as this is not a function properly classified as a usual or essentially governmental one. *South Carolina* v. *United States, supra; Ohio* v. *Helvering; supra; Helvering* v. *Powers,* 293 U. S. 214. See *Proprietors of Mount Hope Cemetery* v. *Boston,* 158 Mass. 509, 519.

As an alternative contention it was strongly urged by the Government in the court below that irrespective of the status of the Boston State Hospital as a state instrumentality, the tax burden here imposed is too indirect and remote to be considered as any interference with or burden upon the Commonwealth of Massachusetts. Cf. *Edelman* v. *Boeing Air Transport,* 289 U. S. 249; *Wheeler Lumber Bridge & Supply Co.* v. *United States,* 281 U. S. 572; *Liggett & Myers Tobacco Co., Inc.* v. *United States,* 77 F. (2d) 65 (C. C. A. 3d), certiorari denied, 296 U. S. 580. The Court of Claims,

however, did not rest its decision upon that ground. It will not, therefore, be dealt with here, although it forms a second basis upon which recovery in the present cases should be denied.

## CONCLUSION

The result reached by the Court of Claims in the present case does not conflict with any decision of this Court. The decision is correct. The petition for certiorari should be denied.

Respectfully submitted.

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**BRIEF FOR THE UNITED STATES**

### OPINION BELOW

The opinion of the Court of Claims (R. 20–26) is reported in 13 F. Supp. 143; 14 F. Supp. 543.

### JURISDICTION

The judgments of the court below were entered April 6, 1936. (R. 26–27.) Order overruling petitioners' motions for new trial was entered June 9, 1936. (R. 27.) The petition for writs of certiorari was filed July 6, 1936 (R. 27), and was granted October 12, 1936. The jurisdiction of this Court rests on Section 3 (b) of the Act of February 13, 1925.

### QUESTIONS PRESENTED

1. Whether the tobacco stamp tax imposed by Section 401 (a) of the Revenue Act of 1926 is a sales tax, imposing a direct burden upon a governmental instrumentality of the Commonwealth of Massachusetts.

2. Whether the Boston State Hospital is an essential governmental instrumentality of the Commonwealth of Massachusetts.

### STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations will be found in the Appendix (*infra*, pp. 29–32).

### STATEMENT

The findings of fact of the Court of Claims (R. 20–22) may be summarized as follows:

On or about January 6, 1932, petitioner Liggett and Myers Tobacco Company received an order

from the Commonwealth of Massachusetts, through its purchasing agent, for the delivery of four boxes of manufactured tobacco, totaling 96 pounds net weight, to the Boston State Hospital, owned and operated by the Commonwealth of Massachusetts in Boston. (R. 21.)

The established Internal Revenue practice and procedure was to affix the tobacco tax stamps required by law to be placed upon the manufactured tobacco before the tobacco was removed from the factory. (R. 21.) The petitioner had, in its bonded warehouse, the tobacco so ordered in packages to which such stamps, duly cancelled, had been affixed. The aggregate amount of the stamps so cancelled was $17.28. (R. 21.)

Pursuant to the order received, the tobacco was delivered on or about January 19, 1932, to the Boston State Hospital, and on the date of shipment the petitioner Liggett and Myers Tobacco Co. sent a bill to the Boston State Hospital in the sum of $30.62, representing the price of the tobacco, including the tax paid by Internal Revenue stamps. This bill was paid by the Commonwealth of Massachusetts. (R. 21.) The tobacco so shipped and received by the hospital was distributed free to patients thereof under the authority of the law of Massachusetts and in the course of institutional treatment of the patients. (R. 21.)

The Boston State Hospital is maintained by the Commonwealth of Massachusetts for care and treatment of those having mental diseases. Insti-

tutional treatment of the insane has existed for several centuries, although the early treatments were largely limited to the confinement of the violently insane. State treatment of the mentally diseased, at public expense, has existed in the United States and in the Commonwealth of Massachusetts for many years, but a few States provide practically no such facilities. The Boston State Hospital is useful in the maintenance of public welfare and order in the Commonwealth of Massachusetts and performs a useful service. The power of restraining patients is conferred upon the hospital by the Commonwealth. While there are private hospitals for the care of the insane, located and operated in the Commonwealth, they are conducted for profit, and the average patients do not have the means to pay their charges. In the Boston State Hospital, patients pay if they are able, but if not, they pay nothing. (R. 22–23.)

Claims for refund in the sum of $17.28, the amount of the stamps used in payment of the tax on the tobacco shipped to the hospital, were filed in due time and in proper form on the ground that the tax sought to be recovered was paid on tobacco sold to the Commonwealth of Massachusetts for use in an institution owned and operated by the Commonwealth as an instrumentality of government. The claims were duly rejected. (R. 22.)

Upon the foregoing findings of fact, the Court of Claims found in each of these cases, as a conclu-

sion of law, that the Hospital was not an essential governmental activity of the Commonwealth of Massachusetts, and, as such, immune from Federal tax, that petitioners were not entitled to recover, and the petitions were dismissed. (R. 22, 23.) The Court of Claims did not pass upon the issues raised in the first and third points discussed in the present brief, but these issues were again raised in the petition for certiorari.

## SUMMARY OF ARGUMENT

1. The tobacco tax imposed by Section 402 (a) of the Revenue Act of 1926 does not cast any direct burden upon the transaction of sale from Liggett and Myers to the Commonwealth of Massachusetts. The tax is imposed upon tobacco manufactured and thereafter sold or removed for consumption or sale. In terms it is imposed upon the manufacturer. It is clearly a tax on the manufacturing of tobacco, postponed as to collection until either removal or sale, whichever occurs first. Since, in practice, removal precedes sale, as a practical matter payment accrues at or prior to removal from the factory. That the tax is clearly laid on manufacturing and not on the sale is evidenced not only by the plain provisions of the statute, but by the title to the Act itself, and the detailed provisions relating to the enforcement and collection of the tax, and by the administrative interpretation as revealed in the

regulations. Other taxes, substantially identical, have been definitely declared by this Court to be manufacturing taxes and not sales taxes. Since no tax was laid on the transaction with the hospital, any burden, so far as Massachusetts was concerned, was indirect and remote, and, under many decisions of this Court, the rule of immunity does not apply.

2. In any event, there is support for the decision of the court below that the maintenance and operation of the Boston State Hospital is not strictly a governmental function. Private hospitals can, and do, perform an identical function, and the rule of immunity has been held to extend only to those sovereign functions which only the State itself can do. Should this strict test be rejected, we believe, in the alternative, that only those activities in which the States have traditionally engaged are immune. Traditionally, care of the poor, including care for the indigent sick and insane, is a proper function of state government. But, traditionally, it is no part of the State's function to operate hospitals for those able to pay, in competition with private institutions. In this case those patients who were able, paid; those unable did not, but the extent of the non-charitable operations is not shown. Should this point be reached, the case should be remanded for further findings.

3. The proper party petitioner is Liggett and Myers Tobacco Company, which is the taxpayer

and the only party recognized by the pertinent statutes. Any judgment rendered against the Government should be in favor of Liggett and Myers.

## ARGUMENT

### I

### THE TOBACCO STAMP TAX DOES NOT DIRECTLY BURDEN ANY STATE GOVERNMENTAL INSTRUMENTALITY

The question here is whether the tobacco stamp tax in the sum of $17.28 paid by the Liggett and Myers Tobacco Company upon tobacco manufactured by it and sold to the Boston State Hospital constitutes a direct burden upon an essential governmental function of the Commonwealth of Massachusetts. It is the Government's position that irrespective of whether the Boston State Hospital is a governmental instrumentality of the State, the tax in question was not laid on the transaction of sale to the hospital but on the privilege of manufacture, and that any burden on the State was, therefore, indirect and remote.

Section 401 (a) of the Revenue Act of 1926, *infra*, provides:

> Upon all tobacco and snuff *manufactured in* or imported into the United States, and hereafter sold by the manufacturer or importer, or removed for consumption or sale, there shall be levied, collected, and paid, * * * a tax of 18 cents per pound, to be

paid by the manufacturer or importer thereof. [Italics supplied.]

That the tax is an excise and not a direct tax is obvious and unquestioned. *Patton* v. *Brady,* 184 U. S. 608; *McCray* v. *United States,* 195 U. S. 27. The question is upon what transaction or act is the tax laid.

It will be observed at the outset that the tax here is utterly unlike the tax involved in *Indian Motocycle Co.* v. *United States,* 283 U. S. 570. There the tax was laid on "articles sold or leased by the manufacturer." The tax was clearly laid "on the sale, and on that alone." But here the tax is not on the sale. It is on tobacco "manufactured" and afterwards sold or removed for consumption or sale. It is clearly a tax laid on the manufacture of tobacco, and postponed as to collection until the tobacco is either sold or removed from bonded warehouses for consumption or sale. The tax, being laid on a luxury and not a necessity, is large. While it was the intent of Congress to lay the tax on the manufacturer for the privilege of manufacture, in order to mitigate the burden, it has postponed the payment of the tax until the manufacturer can bring the goods into market. The tax is laid exclusively on the manufacturer or importer. It cannot be regarded as a sales tax, either as respects time of payment or measurement. It is not levied as of the time of sale, but as of the time

of removal from the factory or of sale, whichever occurs first. The tax would accrue even if a sale never occurred, as for example, if tobacco were removed for the purpose of making a gift. Nor is the tax related in any way to the selling price charged by the manufacturers. It is measured at 18 cents per pound, whether the selling price be high or low. The title to the Act itself shows that Congress intended the tax to be one on the manufacture of tobacco. Title IV of the Revenue Act of 1926 is captioned "Tax on Cigars, Tobacco, and *Manufactures* Thereof." [Italics supplied.] The sales taxes involved in the *Indian Motocycle* case are to be found under a separate and distinct title—Title VI.

Its character as a tax on manufactures is further evidenced by the detailed provisions for the enforcement of the Act, which show that Congress was looking to the manufacturer with respect to the business of manufacturing tobacco. Therein manufacturers of tobacco are defined. Act of August 27, 1894, c. 349, 28 Stat. 509, Sec. 69 (U. S. C., Title 26, Sec. 710). Every manufacturer must register with the Collector of the district. Act of October 1, 1890, c. 1244, 26 Stat. 567, Sec. 26 (U. S. C., Title 26, Sec. 711). He must file with the Collector, before commencing manufacture, a statement describing in detail the sort of manufacturing business he intends to en-

gage in. Section 3355, Revised Statutes, as amended (U. S. C., Title 26, Sec. 712). He must give a bond before undertaking the manufacturing business (Sec. 3355, *supra*; U. S. C., Title 26, Sec. 713), and obtain a certificate for the privilege (Sec. 3355, *supra*; U. S. C., Title 26, Sec. 714). His factory is given a number. Section 3357, Revised Statutes, as amended (U. S. C., Title 26, Sec. 716). He must submit an annual inventory indicating the quantity of each of the different kinds of tobacco, setting forth what tobacco was manufactured and produced by him and what was purchased from others. Section 3358, Revised Statutes (U. S. C., Title 26, Sec. 717). He must keep books and enter therein daily purchases, materials manufactured, sold, consumed or removed for consumption or sale (Sec. 3358, *supra*; U. S. C., Title 26, Sec. 718) and furnish the Collector with monthly abstracts thereof (Sec. 3358, *supra;* U. S. C., Title 26, Sec. 719). All manufactured tobacco must be put up and prepared by the manufacturer in packages of prescribed description. Section 3362, Revised Statutes, as amended (U. S. C., Title 26, Sec. 800). Stamps are required to be affixed and cancelled by the manufacturer in the mode prescribed by the Commissioner. These stamps are to be sold by the Collector "only to the manufacturers" or importers. Section 3369, Revised Statutes (U. S. C., Title 26, Sec. 803 (c)). Penalties are provided if the manufacturer fails to

register with the Collector (Sec. 3387, Revised Statutes, as amended; U. S. C., Title 26, Sec. 850); or if tobacco is removed from the factory improperly stamped (Sec. 3374, Revised Statutes, as amended; U. S. C., Title 26, Sec. 860); or if the manufacturer fails to obtain a certificate entitling him to conduct the business or otherwise fails to comply with the requirements of any of the foregoing provisions (Secs. 3355, 3356, 3358, 3364, 3370, 3372, 3456, Revised Statutes, as amended; U. S. C., Title 26, Sec. 861).

It seems clear from the foregoing that the tax was laid with reference to the privilege of conducting the manufacturing business and is merely postponed as to collection until removal or sale. Moreover, the regulations of the Treasury Department treat the tax as a tax on manufacture and not on sale. Chapter V of Regulations 8 (1928 Ed.), dealing with the subject is entitled, "Manufacturers of Tobacco." Article 3 of these Regulations provides:

> The internal revenue laws imposing taxes on tobacco, snuff, cigars, and cigarettes apply to manufactures produced anywhere within the exterior boundaries of the United States. * * *

Article 43 provides that "Such tax is imposed on all chewing and smoking tobacco, * * * prepared for sale or consumption, * * *. The tax accrues on such manufactures upon removal from the factory or place where they were made, or upon sale prior to such removal, and is to be paid

by the manufacturer thereof by the affixing of stamps before removal." And the regulations throughout deal with the manufacturer in relation to the manufacturing process, clearly treating the statute as a tax on manufacturing. See Regulations 8, Article 33 *et seq.* And, as the court below has found as a fact (R. 21), the established internal-revenue procedure is to affix the stamps before the tobacco is removed from the factory. This established administrative treatment and understanding confirms our interpretation of the statute, and while perhaps not controlling, strengthens our contentions, drawn from the taxing provisions, that the tax is not laid on the sale but on manufacturing. *Indian Motocycle Co.* v. *United States, supra.*

This Court has held taxes similar to the one here to be true manufacturing excises. Thus in *American Mfg. Co.* v. *St. Louis,* 250 U. S. 459, a local tax was imposed requiring every manufacturer in the city to take out a license, and at a specified time to render a sworn statement of the aggregate of sales made by him during the preceding year and within a short time thereafter to pay a license tax of $1 on each $1,000 of sales made. The Court held that the tax was clearly a tax on the privilege of manufacturing and not a sales tax, using this significant language (p. 463):

> The city might have measured such tax by a percentage upon the value of all goods manufactured, whether they ever should

> come to be sold or not, and have required payment as soon as, or even before, the goods left the factory. *In order to mitigate the burden,* and also, perhaps, to bring merchants and manufacturers upon an equal footing in this regard, *it has postponed ascertainment and payment of the tax until the manufacturer can bring the goods into market. A somewhat similar method of postponing payment has been pursued for many years by the Federal Government with respect to the internal revenue tax upon distilled spirits.* Rev. Stats., §§ 3251, 3253; Act of August 27, 1894, c. 349, § 48, 28 Stat. 509, 563. [Italics supplied.]

The Court will observe that the taxes on distilled spirits there referred to were quite similar to the tax here in question, being laid on "distilled spirits * * * that have been or that may be then or thereafter produced," and it being provided that the tax "shall be paid by the distiller of the spirits, on or before their removal from the distillery or place of storage." Act of August 27, 1894, c. 349, 28 Stat. 509, 563, Sec. 48 (U. S. C., Title 26, Sec. 1197). We submit, as in that case, the tax here is on the manufacturing, and, in order to mitigate the burden, payment has been postponed until the manufacturer can bring the goods into market.

The tax here is also plainly like the tax of one cent per pound "upon all filled cheese which shall

be manufactured * * * to be paid by the manufacturer thereof." Act of June 6, 1896, c. 337, 29 Stat. 253, Sec. 9. That statute was undoubtedly patterned after the statute here involved.[1] Stamps were provided, and "the provisions of existing laws governing the engraving, issue, sale, accountability, effacement, and destruction of stamps relating to tobacco and snuff, as far as applicable, are hereby made to apply to stamps provided for by this section." Section 9 (U. S. C., Title 26, Secs. 1001, 1011). As in this case, the statute required the affixation of the stamps at or prior to the time of the sale or removal for consumption or sale. Section 5 (U. S. C., Title 26, Secs. 1002, 1007) and Section 10 (U. S. C., Title 26, Sec. 1001). We can perceive no difference between the tax there and the tax in this case. The filled cheese tax was involved in the case of *Cornell* v. *Coyne*, 192 U. S. 418, and this Court there held that the tax was clearly laid on manufacturing. That case was relied on by the Government in the *Indian Motocycle Co.* case. This Court in the latter case said (p. 575) that the taxes involved in both *Cornell* v *Coyne, supra,* and in *American Mfg. Co.* v. *St. Louis supra,* were "distinctly imposed on manufacturing." This is tantamount to a direct holding that the instant tax is on manufacturing and not on

[1] The tobacco stamp tax in substantially the present form has been in effect for many years.

sale. See also *McCray* v. *United States,* 195 U. S. 27, and *Patton* v. *Brady,* 184 U. S. 608; *Liggett & Myers Tobacco Co.* v. *United States,* 77 F. (2d) 65 (C. C. A. 3d), certiorari denied, 296 U. S. 580; *Anargyros* v. *Edwards,* 26 F. (2d) 319 (C. C. A. 2d).

We submit that the tax in question was laid on manufacturing, the collection being postponed until removal or sale, whichever occurs first. Since removal almost invariably precedes sale, as a practical matter, the payment accrues at or prior to withdrawal, and this is the established Bureau practice.

In this view of the tax, it is clear that no direct burden is placed on the transaction of sale between Liggett and Myers Tobacco Company and the Boston State Hospital, and that the question of immunity does not arise. The tax burden was indirect because the tax was laid on the manufacturer and not on the vendee. It was not laid on the transaction of sale, but on the manufacturing operation antecedent to the sale. It had been paid by the manufacturer prior to the sale. It was "not part of the sale but preliminary to it and wholly the vendor's affair." *Wheeler Lumber Co.* v. *United States,* 281 U. S. 572, 579. The tax was a prior ordinary burden of taxation, and, like an income tax or a property tax, represented a part of the man-

ufacturing cost, and attaching to the article prior to sale, it is not retroactively invalidated merely because a sale is later made. *Cornell* v. *Coyne,* 192 U. S. 418. The vendee neither directly nor indirectly paid the tax, as a tax, but paid a fixed price which might or might not have included the full manufacturing cost of the article including the manufacturing tax thereon. Cf. *Lash's Products Co.* v. *United States,* 278 U. S. 175, 176.

The case is indistinguishable in principle from *Cornell* v. *Coyne,* 192 U. S. 418. There the tax on filled cheese, hereinbefore referred to, similar in all material respects to the tax here, was held to be a manufacturing tax and not to directly burden exportation, in violation of the fifth paragraph of Section 9, Article 1, of the Constitution, although the filled cheese in question was manufactured under contract for export and was in fact exported. The Court said (p. 427):

> The true construction of the constitutional provision is that no burden by way of tax or duty can be cast upon the exportation of articles, and does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated. The exemption attaches to the export and not to the article before its exportation.

Had the tax been laid on the sale rather than manufacture, a different conclusion would have

been reached as to goods sold in export. *Spalding & Bros.* v. *Edwards,* 262 U. S. 66; *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292; *U. S. Glue Co.* v. *Oak Creek,* 247 U. S. 321, 329. So here, the rule is that no burden may be cast upon the sale of articles to a State in the performance of an essential governmental function, but this does not mean that articles sold to a State are relieved from prior ordinary burdens of taxation which rest upon all property similarly situated. The exemption attaches to sales and not to articles before sale. See also *Wheeler Lumber Co.* v. *United States,* 281 U. S. 572; *Turpin* v. *Burgess,* 117 U. S. 504, 507; *Coe* v. *Errol,* 116 U. S. 517; *Edelman* v. *Boeing Air Transp.,* 289 U. S. 249; *Nashville, C. & St. L. Ry.* v. *Wallace,* 288 U. S. 249, 268.

This case, therefore, comes within the rule established by a long line of cases, that a non-discriminatory excise tax is not invalid because indirectly it may burden either the State or the national Government. *Educational Films Corp.* v. *Ward,* 282 U. S. 379; *Fox Film Corp.* v. *Doyal,* 286 U. S. 123; *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514; *Denman* v. *Slayton,* 282 U. S. 514; *United States* v. *Perkins,* 163 U. S. 625; *Snyder* v. *Bettman,* 190 U. S. 249; *Burnet* v. *A. T. Jergins Trust,* 288 U. S. 508; *Trinityfarm Co.* v. *Grosjean,* 291 U. S. 466; *Willcuts* v. *Bunn,* 282 U. S. 216.

The cases relied on by the petitioner are readily distinguishable. The tax in the *Indian Motocycle Co.* case, as we have said, was on motorcycles "sold

or leased by the manufacturer." It was laid "on the sale, and on that alone." It seems clear from the opinion that had the tax been similar to the one here, an opposite result would have been reached. The tax considered in *Panhandle Oil Co.* v. *Knox,* 277 U. S. 218, was likewise upon the privilege of sale exclusively, and not upon some activity or condition antecedent thereto. In *Graves* v. *The Texas Company,* No. 727, October Term, 1935, decided May 18, 1936, the tax was upon the storage and withdrawal of gasoline. It was held that a tax upon anything so essential to the sale of gasoline to the United States is as objectionable as would be a tax upon the sale itself. The tax was deemed to be equivalent to the sales tax involved in the *Panhandle* case. Here, on the other hand, the tax is not upon anything essential to the sale to the State, or upon anything connected with that sale, but upon the antecedent manufacturing operations.

## II

### THE BOSTON STATE HOSPITAL IS NOT AN ESSENTIAL GOVERNMENTAL INSTRUMENTALITY IMMUNE FROM FEDERAL TAXATION

Conceding, *arguendo,* that the tax in question does lay a direct burden on the Boston State Hospital, there remains the question, decided by the court below, of whether the hospital is an essential governmental function of the Commonwealth of Massachusetts.

The rule of immunity is implied from the independence of the national and state governments within their respective spheres and from the provisions of the Constitution which look to the maintenance of the dual system. The reasons underlying the principal mark the limits of its range. *Indian Motocycle Co.* v. *United States,* pp. 575, 576. Since the rule is aimed at the protection of the operations of government, the immunity does not extend "to anything lying outside or beyond governmental functions and their exertions." *Fox Film Corp.* v. *Doyal,* 286 U. S. 123, 128; *Board of Trustees* v. *United States,* 289 U. S. 48. The rule is further limited by the principle that the Federal taxing power is no less essential than the powers reserved to the States, and, while preserving the latter, it is important not to cripple the former. Hence, the successful working of our dual governmental system requires that the principle of immunity be applied so as to interfere as little as possible with the important functions of Federal taxation, and therefore, the rule is to be strictly applied. *Willcuts* v. *Bunn,* 282 U. S. 216, 225; *Educational Films Corp.* v. *Ward,* 282 U. S. 379, 391.

The difficulty lies in drawing the line which separates those activities having some relation to government, which are nevertheless subject to taxation, from those which are immune. Experience has shown that there is no formula by which that

line may be plotted with precision in advance. *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514, 523.

The court below held that immunity is limited to those functions which are of "a strictly governmental character." *South Carolina* v. *United States,* 199 U. S. 437, 461. By "strictly governmental character" it thought reference was made to the operations which embody some kind of control over persons or things which can be exercised only by a sovereign power, that is, those agencies through which the state government "immediately and directly exercises its sovereign powers." *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514, 522. The Court relied on the distinction made in *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, where the Court said (p. 172):

> The true distinction is between the attempted taxation of those operations of the States *essential* to the execution of its governmental functions, and *which the State can only do itself,* and those activities which are of a private character. The former, the United States may not interfere with by taxing the agencies of the State in carrying out its purposes; the latter, although regulated by the State, and exercising delegated authority, such as the right of eminent domain, are not removed from the field of legitimate Federal taxation. [Italics supplied.]

Thus, it is the view of the court below that only the sovereign functions, that is, only those func-

tions which the State itself can do, are immune. Since there are private hospitals for the care of the insane located and operated in the State (R. 21) it concluded that the State Hospital is not immune from Federal taxation (R. 26).

While there is support for this position, it must be conceded that it has not been generally accepted by the lower courts. See, e. g., *Commissioner* v. *Sherman,* 69 F. (2d) 755 (C. C. A. 1st); *Commissioner* v. *Ten Eyck,* 76 F. (2d) 515 (C. C. A. 2d); *Brush* v. *Commissioner,* 85 F. (2d) 32 (C. C. A. 2d), now pending in this Court on application for certiorari, No. 451, present term; *Halsey* v. *Helvering,* 75 F. (2d) 234 (App. D. C.); *Lyons* v. *Reinecke,* 10 F. (2d) 3 (C. C. A. 7th). Considerable confusion now exists as to the proper rule to be applied in these cases.

The existing doubt and confusion arises not only out of the inherent difficulties of the problem,[2] but because of what seems to us to be a clear misunderstanding of this Court's recent decision in *Helver-*

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[2] Confusion is added by the frequent recourse to those cases involving governmental liability in tort. Resort to those cases, while sometimes helpful, is dangerous and confusing, for there is much uncertainty and conflict of principle among them. This confusion should not be extended to the field of Federal taxation, where the need for uniform rules is apparent. It seems to us that there is little in common between the two lines of cases. Governmental im-

*ing* v. *Powers,* 293 U. S. 214. There, in holding that the operation of a street railway system was not governmental, this Court said (p. 227):

> We see no reason for putting the operation of a street railway in a different category from the sale of liquors. In each case, the State, with its own conception of public advantage, is undertaking a business enterprise of a sort that is normally within the reach of the federal taxing power and is distinct from the *usual* governmental functions that are immune from federal taxation in order to safeguard the necessary independence of the State. * * * [Italics supplied.]

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munity in tort cases, originating in the doctrine that the king can do no wrong, largely depends upon whether the doctrine of *respondeat superior* applies; whether in the performance of public governmental duties, the officers are agents of the State or only of a particular locality; whether the powers exercised are for the benefit of the public at large or whether they are for the peculiar benefit of the particular municipality. These distinctions are not determinative of the question here of whether, judging the activity itself, the State itself, or its municipality, is engaged in that type of governmental activity which should be free from Federal taxation. It seems to us that immunity from taxation is to be governed by different and stricter rules than is immunity from suit. In any event, even in tort cases the modern tendency is against the rule of governmental non-liability. See Borchard, Governmental Liability in Tort, 34 Yale Law Journal, 1, 129, 229, 239, 258; *Augustine* v. *Town of Brant,* 249 N. Y. 198.

Since that decision, taxpayers are placing emphasis on the use by this Court of the words "normal" and "usual." It is argued that in employing these words this Court has rejected the strictly narrow application of the doctrine of immunity established in prior decisions and has recognized the applicability of the rule of immunity in a broader field of state activity. See *Commissioner* v. *Ten Eyck, supra.* Thus it is said that the ownership and operation by local governments of waterworks and like utilities have become normal and usual, not only in the several States but throughout the world. See *Brush* v. *Commissioner, supra.*

However, we believe that there was no intent in the *Powers* case to employ the word "usual" in a sense different from the words "ordinary" and "strictly" used in *South Carolina* v. *United States,* 199 U. S. 437, 451, 461, or the word "essential" used in *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 172. This seems evident from the citation and approval in the *Powers* case (p. 225), of the *Stone Tracy Co.* and *South Carolina* cases. Nor do we think that this Court intended to extend immunity to any new business ventures of the States, at the expense of Federal revenues, merely because States generally have entered those fields.

This belief is strengthened by the more recent decision of this Court in *United States* v. *Cali-*

*fornia*, 297 U. S. 175. There, in speaking of the rule of immunity, the Court said (pp. 184–185):

> Its nature requires that it be so construed as to allow to each government reasonable scope for its taxing power, see *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 522–524, which would be unduly curtailed if either by extending its activities could withdraw from the taxing power of the other subjects of taxation *traditionally* within it. *Helvering* v. *Powers*, 293 U. S. 214, 225; *Ohio* v. *Helvering*, 292 U. S. 360; *South Carolina* v. *United States*, 199 U. S. 437; see *Murray* v. *Wilson Distilling Co.*, 213 U. S. 151, 173, explaining *South Carolina* v. *United States*, *supra*. Hence we look to the activities in which the states have *traditionally* engaged as marking the boundary of the restriction upon the federal taxing power. * * * [Italics supplied.]

It is the position of the Government that should the Court reject the stricter rule advocated by the Court of Claims, the "traditional" test above outlined should be preferred. This test conforms to principles heretofore established by this Court. It would grant immunity to a wide range of state functions and at the same time would prevent the extension of state activity into new fields at the expense of the Federal revenues. While there will still be difficulty, in particular cases, in determining when a particular activity is traditional, still, on the whole, this test is as satisfactory and as definite as any we are likely to find.

Should this test be applied, the instant case should be remanded to the court below for further findings. Traditionally, the care of the poor, the indigent sick and infirm, including the indigent insane, is a proper function of government. While such care is not "strictly governmental" in the sense understood by the court below, it is an activity in which the States have traditionally engaged. While originally deemed the function of the Church alone, provision for the relief of the poor had been adopted by the English legislature as early as 1535 (27 Hen. 8, c. 25), while the monasteries were yet standing. Long prior to the adoption of our Constitution, poor relief had become a recognized duty of the state. 1 Hallam, Constitutional History of England (1854 Ed.), p. 80. In the colonies, relief for the poor, including the maintenance of alms houses, work houses, and the like, was recognized as one of the functions of government. Cf. *Foster* v. *Worcester,* 33 Mass. (16 Pick.) 71.[3] But while care for the indigent insane, including free hospitalization, may well be regarded as, traditionally, a state activity, it is clearly not, traditionally, the state function to maintain hospitals for paying patients in competition with private hospitals. Charitable hospitals

[3] It should be observed that the Boston State Hospital is not a place for the confinement of the criminally insane, but a place for the care and treatment of the mentally deranged. It is not different from a tuberculosis hospital or a general hospital maintained and operated by the State. (R. 21.)

maintained by the State should be exempt; non-charitable hospitals should not. Of course, a charitable hospital is not rendered non-charitable merely because a few patients pay. Neither is a hospital rendered charitable merely because a few charity patients are accommodated. And this should be true, even though the hospital is not operated for profit, and the patients are charged only enough to defray operating costs, because where a State operates a hospital, open to all patients alike, to the extent that it furnishes facilities to those able to pay, it operates in direct competition with similar private institutions, and to that extent, it exceeds its traditional activities and enters the field traditionally reserved for Federal taxation. Of course, it may be difficult to draw the line between the charitable and non-charitable. But it seems to us that for the rule of immunity to apply, it must appear that the hospital is maintained and operated primarily and principally for the benefit of the indigent sick or insane. If, to a large and substantial degree, it receives paying patients, and is, in fact, a competitor with private institutions, then it should lose its cloak of immunity. This has been the position of the Treasury Department on the subject. I. T. 2357, VI–1 Cumulative Bulletin 52; Mim. 3838, IX–2 Cumulative Bulletin 137; G. C. M. 10814, XI–2 Cumulative Bulletin 113.

The record in this case shows that "in the Boston State Hospital, patients pay if they are able,

but if not pay nothing." (R. 21–22.) The extent of the non-charitable function is not shown.

It would seem, therefore, that should the Court hold that the tax does directly burden the transaction with the State, and should it reject the strict test of governmental function adopted by the court below, then it should remand the case with instruction to determine the extent of the non-charitable functions performed by the hospital, and if the court below should find that these are so substantial as, in fact, to render the hospital a competitor with private institutions operated for profit, then it should be instructed to hold that the activity is non-governmental, but if it should find that it is operated primarily and principally for the care of the indigent insane and the care of paying patients is only incidental, then it should be instructed to hold that the activity is governmental and immune from Federal taxation.

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Should the Court, for any reason, rule against the Government, then, of course, only one of the parties petitioner can recover judgment. This is a case for the recovery of taxes alleged to have been overpaid. The tax is imposed upon the Liggett and Myers Tobacco Company. That company is the only party recognized by the statutes dealing with refund claims and suits to recover. Any judgment against the Government should, there-

fore, be in favor of Liggett and Myers. *Indian Motocycle* v. *United States, supra; Panhandle Oil Co.* v. *Knox, supra; Builders' Club of Chicago* v. *United States,* 14 F. Supp. 1020 (C. Cls.). Serious administrative difficulties might arise if parties other than the taxpayer were permitted to file claims and bring suit.

## CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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NOVEMBER 1936.

## APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 401. (a) Upon all tobacco and snuff manufactured in or imported into the United States, and hereafter sold by the manufacturer or importer, or removed for consumption or sale, there shall be levied, collected, and paid, in lieu of the internal-revenue taxes now imposed thereon by section 401 of the Revenue Act of 1924, a tax of 18 cents per pound, to be paid by the manufacturer or importer thereof. (U. S. C., Title 26, Secs. 700–701.)

SEC. 1101. The Commissioner, with the approval of the Secretary, shall prescribe and publish all needful rules and regulations for the enforcement of this Act. (U. S. C., Title 26, Secs. 1049, 1350, 1691.)

Treasury Regulations No. 8 (1928 Ed.):

ART. 43. *Rates of tax on tobacco and snuff—Date effective—When tax accrues.*— The rate of tax on tobacco and snuff now in force is 18 cents per pound. The rate is the same as under the Revenue Acts of 1918, 1921, and 1924, but the tax is imposed by the above-quoted provisions of the Revenue Act of 1926, which became effective upon its enactment. That act was approved February 26, 1926. Such tax is imposed on all chewing and smoking tobacco, fine-cut, Cavendish, plug, or twist, cut or granulated, of every description, on tobacco twisted by hand or reduced into a condition to be consumed, or in any manner other than the ordinary mode

of drying and curing, prepared for sale or consumption, even if prepared without the use of any machine or instrument, and without being pressed or sweetened, and on all fine-cut shorts and refuse scraps, clippings, cuttings, and sweepings of tobacco. Tax also accrues on snuff manufactured of tobacco or any substitute for tobacco, ground, dry, damp, pickled, scented, or otherwise, of all descriptions, when prepared for use, and on snuff flour when sold or removed for use or consumption. The tax accrues on such manufactures upon removal from the factory or place where they were made, or upon sale prior to such removal, and is to be paid by the manufacturer thereof by the affixing of stamps before removal. Refuse scraps, clippings, cuttings, etc., are, however, not subject to tax when removed from the factory in compliance with article 99 of these regulations.

ART. 52. *Mode of affixing tobacco and snuff stamps.*—Each package containing a statutory quantity of tobacco or snuff (see article 45) shall, before removal from the bonded factory premises where made, have affixed thereto the proper internal-revenue stamps or stamps of such denomination as will cover fully the tax on the net weight of the contents. Tobacco stamps must be used only on packages of tobacco, and snuff stamps only on packages of snuff. Such stamps cannot be used interchangeably.

* * * * *

ART. 57. *Manufacture on commission or shares, or from material furnished by another person.*—Whenever tobacco or snuff of any description is manufactured, in whole or in part, upon commission or shares, or the material from which any such articles are made, or are to be made, is furnished by

one person and made and manufactured by another, or the material is furnished or sold by one person with an understanding or agreement with another that the manufactured article is to be received in payment therefor or for any part thereof, the stamps required by law shall be affixed by the actual maker or manufacturer before the article passes from the place of making or manufacturing. And in case of fraud on the part of either of said persons in respect to said manufacture, or of any collusion on their part with intent to defraud the revenue, such material and manufactured articles shall be forfeited to the United States; and each party to such fraud or collusion shall be deemed guilty of a misdemeanor, and be fined not less than $100 nor more than $5,000 and imprisoned for not less than six months nor more than three years. (Sec. 3370, R. S.)

ART. 94. *Temporarily closing factory.*—No manufacturer of tobacco, snuff, cigars, or cigarettes will be permitted to close his factory with material or finished product unstamped on hand. Though manufacturing has been discontinued, the manufacturer will continue to render return on Form 62 or 72, as the case may be, each month, and inventory on Form 70a or 70b, as the case may be, annually to the collector until disposition of the material and manufactured stock is regularly reported, and closing inventory showing nothing on hand is filed, or factory is transferred to successor or to another district as provided in articles 95 and 97, respectively.

ART. 122. *Deficiencies found by examining officers.*—Whenever a deputy collector or other internal revenue officer or agent in

examining a cigar or tobacco factory finds that manufactured products have apparently been removed from the place of manufacture unstamped, or without the proper tax due thereon having been paid, or that there are deficiencies in the manufacturer's production or stamp accounts, he will require the proper entries to be made in the manufacturer's revenue book, showing the deficiency, and report at once the facts and the amount of such omitted tax ascertained by him to the collector. * * *

ART. 152. *Penalty for removal of products from factory not properly packed and stamped.*—(a) Every person who removes from any manufactory, or from any place where tobacco or snuff is made, any manufactured tobacco or snuff without the same being put up in proper packages, or without the proper stamp for the amount of tax thereon being affixed and canceled as required by law; or if the same be intended for export, without the proper export stamp being affixed; shall for each such offense, respectively, be fined not less than $1,000 nor more than $5,000, and be imprisoned not less than six months nor more than two years. (Sec. 3374, R. S.)

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# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1936**

## No. 161

LIGGETT AND MYERS TOBACCO CO., *Petitioner,*

*vs.*

THE UNITED STATES.

## No. 162

THE COMMONWEALTH OF MASSACHUSETTS, *Petitioner,*

*vs.*

THE UNITED STATES.

## No. 163

LIGGETT AND MYERS TOBACCO CO., ON BEHALF OF THE COMMONWEALTH OF MASSACHUSETTS, *Petitioner,*

*vs.*

THE UNITED STATES.

## PETITION FOR REHEARING.

Come now the above-named appellees and present this petition for a rehearing of the above entitled cases and in support thereof respectfully show:

I.

THE DECISION IS BASED UPON THE CONCLUSION THAT THE TAX IN QUESTION IS LAID UPON MANUFACTURE UPON THE INCORRECT ASSUMPTIONS THAT PAYMENT ALONE IS DEFERRED UNTIL SALE OR REMOVAL—NOT THE INCIDENCE OF THE LEVY; THAT THE ABSENCE OF A PRICE MEASURE INDICATES THE TAX TO BE ON MANUFACTURE; THAT THE ADMINISTRATIVE PROVISIONS OF THE TAXING ACT INDICATE CONGRESS REGARDED THE EXCISE AS ONE ON MANUFACTURE AND THAT THERE IS NO INDICATION OF A PURPOSE TO MAKE SALE OR REMOVAL THE BASIS OF THE INCIDENCE OF THE TAX.

## II.

THE DECISION IS BASED UPON THE INCORRECT ASSUMPTION THAT THE TAX IN QUESTION IS SIMILAR TO THE TAXES INVOLVED IN CORNELL v. COYNE, AMERICAN MFG. CO. v. ST. LOUIS AND WHEELER LUMBER B. & S. CO. v. UNITED STATES.

## III.

THE DECISION IS BASED UPON THE INCORRECT ASSUMPTION THAT THE TAX IN QUESTION ONLY REMOTELY BURDENS THE COMMONWEALTH OF MASSACHUSETTS.

## IV.

THE DECISION INVOLVES POTENTIALLY THE PROTECTION OF THE SOVEREIGNTY NOT ONLY OF THE COMMONWEALTH OF MASSACHUSETTS BUT OF EVERY STATE IN THE UNION.

## I.

**The decision is based upon the conclusion that the tax in question is laid upon manufacture upon the incorrect assumptions that payment alone is deferred until sale or removal—not the incidence of the levy; that the absence of a price measure indicates the tax to be on manufacture; that the administrative provisions of the Taxing Act indicate Congress regarded the excise as one on manufacture and that there is no indication of a purpose to make sale or removal the basis of the incidence of the tax.**

This case involved the question whether the tax imposed under section 401 (a) of the Revenue Act of 1926, c. 27, which reads as follows:

> "Upon all tobacco and snuff manufactured in or imported into the United States, and hereafter sold by the manufacturer or importer, or removed for consumption or sale, there shall be levied, collected, and paid, in lieu of the internal revenue taxes now imposed thereon by section 401 of the Revenue Act of 1924, a tax of 18 cents per pound, to be paid by the manufacturer or importer thereof."

could constitutionally apply to tobacco sold by the manufacturer to The Commonwealth of Massachusetts for use in institutional treatment in an insane hospital owned and operated at public expense by the Commonwealth.

The claim for refund to the Commissioner of Internal Revenue was denied by him on the ground that the tax was a tax on "removal." Before the Court of Claims it was also contended by the Federal Government that the maintenance of the insane hospital was not such a governmental activity as was entitled to immunity from Federal taxation. The Court of Claims found it unnecessary to pass upon the "removal" contention and sustained the Commissioner's action on the ground that the insane hospital was not an instrumentality with respect to the maintenance of which Massachusetts was entitled to immunity. The Supreme Court having issued a writ of certiorari, the Federal Government in its brief on the merits also suggested the further defence that the tax is upon manufacture, the time of collection simply being deferred until sale or removal for consumption or sale, and hence that it imposes no direct burden upon the purchaser. This ground of defence was perhaps not seriously apprehended nor adequately argued by the petitioners. It is understood to be the ground upon which the Supreme Court affirmed the judgments of the Court of Claims. The Court apparently construes the tax to be on manufacture solely and having adopted such a construction applies the rule enunciated in *Cornell* v. *Coyne,* 192 U. S. 418. It is submitted that analysis will reveal that it was not the congressional intent so to lay the tax. The statute certainly does not use the natural and appropriate language for laying a tax which is to have its incidence in manufacture. The taxing clause lays the tax on tobacco whether manufactured in the United States or imported into the country "and hereafter sold by the manufacturer or im-

porter, or removed for consumption or sale." In the Codification of Internal Revenue Laws submitted to the Joint Committee on Internal Revenue Taxation by its staff January 30, 1933, is a note to the taxing clause here involved indicating that the word "hereafter" is omitted from its draft as "surplusage." Whether the placing of the word "hereafter" be considered significant or not, the word "and" is conjunctive and precludes the possibility of contention that Congress employed apt language to express an intent to lay a tax on manufacture alone. If, as suggested in one of the three briefly stated reasons of this Court in support of its conclusion, it were the intent of Congress to make the tax have its incidence in manufacture or importation, as the case might be, simply deferring the payment to mitigate the burden, Congress would naturally have used the word "when," not "and." Moreover, if it were the intent merely to defer *payment,* appropriate language to defer payment alone would naturally have been adopted. The taxing clause hereinbefore quoted is the only clause imposing the tax. If this clause does not impose the levy, there is no levy. This clause clearly is so worded as not only to "defer" the payment of the tax but the very levy itself. The statute says "levied, collected and paid." All depend on the happening of certain contingencies and the happening of those contingencies is equally essential with respect to levy, collection and payment. Until those contingencies including sale or removal for consumption or sale have occurred, there is no levy, no right to collect nor any requirement to pay. Now it is clear that the type of tobacco being subjected to levy is manufactured tobacco whether manufactured in this country or imported from abroad. U. S. C., Tit. 26, Sec. 760, lays a tax on leaf tobacco sold, removed or shipped by dealers equal to the tax laid on manufactured tobacco only for violation of certain statu-

tory provisions calculated to insure collection of the tax on manufactured tobacco. Therefore tobacco of the class taxed, however it comes into being, whether by manufacture within the confines of the nation that has the jurisdiction to tax on manufacture or by manufacture abroad where Congress has no power to levy on manufacture, is subjected to one and the same levy upon the happening of certain contingencies. There is no element of contingency truly dependent upon the character of the origin of the tobacco. All manufactured tobacco, irrespective of where it was manufactured, is subject to the tax upon the happening of definite contingencies and not until the happening of such contingencies. These contingencies are sale or removal for consumption or sale. The distinction is amply manifest in connection with a change of rate in the tax. If that which causes the incidence of the tax is manufacture and manufacture occurs prior to the effective date of the change in rate, the earlier rate obtains even though the tobacco remains unsold. If, on the other hand, that which causes the incidence of the tax is sale, then even though the tobacco was manufactured or imported prior to the effective date of the act, it would bear the new rate if sold after the effective date. In other words the issue is not one of mere deferring of the time of payment. It involves the character and existence of the levy itself. The placing of the word "hereafter" before the word "sold" rather than before the word "manufactured" has significance even though after lapse of time the word itself may have been deemed to have lost its usefulness. At the time of enactment when it would be necessary to indicate whether the tax was to apply to tobacco *manufactured* after enactment or *sold* after enactment, it is evident Congress meant to make clear that the tax applied to tobacco *sold* after enactment. The importance of such a distinction was involved in the case of *Patton* v. *Brady*, 184 U. S.

608, which though not referred to in the opinion of this Court, is believed to have an important bearing. In that case, in providing ways and means to finance the Spanish-American War, Congress imposed in lieu of a six cent tax on tobacco and snuff manufactured and sold or removed for consumption or use, a twelve cent tax upon all tobacco and snuff, however prepared, manufactured, and sold, or removed for consumption or sale. The Act further provided: "And there shall also be assessed and collected, with the exceptions hereinafter in this section provided for, upon all articles enumerated in this section which were manufactured, imported and removed from factory or custom house before the passage of this act bearing tax stamps affixed to such articles for the payment of the taxes thereon, and canceled subsequent to April fourteenth, eighteen hundred and ninety-eight, and which articles were at the time of the passage of this act held and intended for sale by any person, a tax equal to one half the difference between the tax already paid on such articles at the time of removal from the factory or customhouse and the tax levied in this act upon such articles." In its opinion in that case the Supreme Court at Page 617 says:

> "Ever since the early part of the Civil War there has been a body of legislation, gathered in the statutes under the title INTERNAL REVENUE, by which, upon goods intended for consumption, excises have been imposed in different forms at some time intermediate the beginning of manufacture or production and the act of consumption. Among the articles thus subjected to those excises have been liquors and tobacco, appropriately selected therefor on the ground that they are not a part of the essential food supply of the nation, but are among its comforts and luxuries. The first of these acts, passed on July 1, 1862 (12 Stat. at L. 432, chap. 119), in terms provided for 'the collection of internal duties, stamp duties, licenses, or taxes imposed

> by this act,' and included manufactured tobacco of all descriptions. Subsequent statutes changed the amount of the charge, the act of 1890 reducing it to 6 cents a pound. Then came the act in question, which, for the purpose of providing means for the expenditures of the Spanish War, increased the charge to 12 cents a pound, specifying distinctly that it was to be 'in lieu of the tax now imposed by law.' Nothing can be clearer than that in these various statutes, the last included among the number, Congress was intending to keep alive a body of excise charges on tobacco, spirits, etc. It may be that all the taxes enumerated in these various statutes were not excises, but the great body of them, including the tax on tobacco, were plainly excises within any accepted definition of the term."

The Court then recites several definitions of an excise and finds the tax involved in the case to be an excise and not a property tax. It holds that the power to increase the rate resides in Congress until the tobacco passes to consumption. Hence even though the tobacco involved had passed from the hands of the manufacturer and had paid a six cent tax, Congress could constitutionally increase the excise to twelve cents and collect the difference from the person still holding the tobacco for sale. It is to be noted that the issue considered in the *Brady* case involved primarily the constitutional power of Congress to do what it did do —namely, levy an excise not only after manufacture was complete but subsequent in the particular case to sale by the manufacturer—not what the Congress by its act did do. Apparently neither the parties nor the Court considered that the tobacco tax was in fact laid (irrespective of Congressional power to levy) on manufacture. It is obvious, moreover, that if the tax in question had been considered to be a tax on manufacture, nothing happened after the 1898 act became effective to cause it to apply to the tobacco in question. That particular tobacco had passed

out of the hands of the manufacturer. In other words there the words "and sold, or removed for consumption or sale," clearly had to be given some other significance than *when* sold, or removed for consumption or sale. The act of sale or removal had to be the foundation of the tax itself. It could not be considered a mere deferment of the time when the excise on manufacture might be paid. That it was in lieu of a line of tobacco taxes, all, as pointed out by the Court, of the same general character, is persuasive as to the intent and purpose of that line of taxes both before and subsequent to the particular levy considered in the *Brady* case. To be sure later taxes as under the law involved in the instant cases provide for impingement of the excise on first sale—that is upon sale by the manufacturer or importer as the case may be, but this indicates no intent to change the character of the tax to such extent as to cause it to have its incidence in manufacture. It is a common practice in connection with taxes on or measured by sales and intended to bear upon the consumer to lay the tax on or with respect to first sale in order to insure and simplify collection. Many, if not most, taxes with respect to the sale of gasoline are so levied.

This distinction between a tax incident upon manufacture and a tax incident upon sale or removal was early recognized by the Supreme Court in *Pennington* v. *Coxe*, 2 Cranch 33:

> "Under date of June 5, 1794, the Third Congress passed an act numbered as Chapter 51 which provided as follows:
>
> 'SECTION 1. And be it further enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the 30th day of September next, there be levied, collected and paid, upon all snuff, which, after that day, shall be manufactured for sale, within the United

States, at any manufactory, for every pound of snuff, eight cents.

'SECTION 2. And be it further enacted, That from and after the said 30th day of September next, there be levied, collected and paid, upon all sugar which shall be refined within the United States, a duty of two cents per pound.' "

In *Pennington* v. *Coxe,* the court held that although sugar was refined prior to the repeal of the Act of 1794 in April, 1802, it was not subject to tax, it not being removed until after that day. In disposing of the case, the Chief Justice points out at page 60 that

> "Within respect to refined sugars no duty can ever be demanded, unless the demand be predicated on the fact of removal."

And again at page 62, he says:

> "The refiner of sugars never hazards the payment of the duty himself, because he is never to pay it until they are presumed to be sold, by being sent out of the building in which they have been refined. In most other cases it has been deemed sufficient to secure this object by a credit, which will allow time for the sale of the article, after which the duty must be paid whether the article be sold or not. But in the case of refined sugars, the refiner never can be liable for the duty, but on a fact which is considered, and properly considered, as evidencing a sale, after which a credit for the collection of the duty is still allowed him. With respect to the refiner of sugars, then, it must, on an inspection of the act, emphatically be said that the legislature designed him to collect the duty from the consumer, but never to pay it from the manufacture; that the tax should infallibly be imposed on expense, and never on labor."

Similarly under the law imposing the tax in the instant cases, the manufacturer or importer never hazards the pay-

ment of the tax himself, because he is never required to pay it until the tobacco is either actually sold or is "presumed to be sold" by being removed from the bonded premises. There exists no obligation to affix stamps until sale or removal. If the tobacco is destroyed by fire after manufacture but before sale or removal there is no tax liability.

The Supreme Court in the instant cases states that "the administrative provisions of the taxing Act indicate that Congress regarded it as an excise on manufacture." Just what administrative provisions point to this conclusion are not specifically indicated. The Federal Government in its brief suggested a number of administrative provisions as bearing on the point. Admittedly each and every one of these provisions is calculated to insure payment of the tax upon all tobacco that shall pass from the hands of the manufacturer by way of sale or for consumption or sale except in instances where the tobacco is to be exported but not one of them indicates any purpose that the tax shall have its incidence in manufacture or at any time prior to sale or removal. The entire text of the Federal law relating to the taxation of tobacco has been carefully examined and it is believed that it no where contains any provision, administrative or otherwise, that is inconsistent with the view that the tax has its inception at the time of sale or removal and not before. On the contrary certain provisions having reference to import duties and to exports, as more fully referred to under heading II, at least tend to indicate the tax was aimed neither at importation nor manufacture. So far as administrative *action* is concerned, it would appear that the tax has been treated rightly or wrongly as having its incidence in removal. This Court in its opinion in the instant cases says "Apparently the practice is to affix the required stamps without regard to sale or removal." It is believed that this is an incorrect assumption. The record

does indicate the established procedure of the Department of Internal Revenue was to require that the stamps be affixed before the tobacco was removed from the factory, but this does not indicate disregard of removal in connection with affixation. It is not found that the record indicates the practice apart from this requirement but it is believed that in fact the practice does have a distinct regard for sale or removal. Although it does not appear in the record, it is the fact that in response to an inquiry, the Liggett & Myers Tobacco Co. wrote the Collector of Internal Revenue under date of May 14, 1934, with respect to the stamping of the tobacco involved in the instant cases a letter containing this paragraph:

> "The stamps on the boxes containing this tobacco were cancelled in January, 1932, and pasted on the packages on January 8, 1932, one day prior to the shipping date, in order to allow them to dry thoroughly before shipping."

It is believed that no such practice as the Court assumes in fact exists.

A third reason indicated by this Court, and it is believed the only other reason stated in the opinion, for considering that the tax in the instant cases was on manufacture is that "The tax is laid upon each pound of manufactured tobacco irrespective of intrinsic value or price obtained upon sale." It is submitted that in so far as the absence of a price measure is relied on as a positive indication that the tax was intended to be on manufacture alone, it is unwarranted. Taxes on manufacture are not infrequently measured by receipts from sales and certainly the weight of the article sold is not so customarily adopted as the orthodox measure for taxes on manufacture as to afford a basis for a presumption that when the measure of a tax is in terms of pounds sold it should be inferred to be a tax on

manufacture. Indeed the use of such a measure would probably be found to be infrequent as compared to other means of admeasuring taxes on manufacture. And in so far as the absence of a price measure is relied on to negative the contention that the tax does have its incidence in sale or removal for consumption or sale it would seem equally without warrant. The most common method of measuring taxes upon the sale of gasoline is number of gallons, not price. In the case of *Panhandle Oil Co.* v. *Mississippi ex rel. Knox*, 277 U. S. 218, in which it was held that the tax would not apply to gasoline sold the United States, the measure of the tax was number of gallons, not price. This was also true of the tax involved in *Graves* v. *Texas Co.*, 298 U. S. 393. It is true that in the case of *Indian Motocycle Co.* v. *United States*, 283 U. S. 570, in construing a statute so ambiguous in wording as apparently to leave some room for doubt as to whether it was the intent to levy tax on manufacture alone or on manufacture *and* sale, or on sale alone, this Court relied upon a number of different reasons for reaching the conclusion that the levy was intended to be upon sale and among the reasons it was suggested that the price measure indicated an intent to levy upon sale rather than upon manufacture, doubtless in the thought that the price measure applies more appropriately to a tax laid on sales than to a tax laid on manufacture. But there was no intimation that a measure other than price was not equally appropriate to admeasure a tax impinging at the time of sale. In other words the price measure might be inferred to be less appropriate as a measure for a tax on manufacture than for a tax on sale, but it would not follow that number of pounds of an article sold or number of gallons sold would be an unnatural method of measuring a tax on the sale of an article. As before pointed out, the most common measure for a tax on the sale of gasoline is num-

ber of gallons, not price. It is also believed that the more common measure for taxes on the sale or privilege of sale of tobacco products in the various states having such taxes is weight or units, not price. Of eighteen states listed in "Tax Systems of the World" as having taxes on the sale or privilege of selling cigarettes and tobacco, eleven follow the weight or unit measure as against seven using price. Both the *Indian Motocycle* case and the *Panhandle Oil* case make clear that the fact that the tax applies only to first sale, or that the tax is collected from the manufacturer, or seller, does not make the burden of the tax so remote as to make the burden indirect as applied to the purchaser. In the *Indian Motocycle* case the Court says at page 574:

> "Counsel for the Government regard it as laid on manufacture, production or importation, or, in the alternative, on any one of these *and* the sale. We think it is laid on the sale, and on that alone. It is levied as of the time of sale and is measured according to the price obtained by the sale. It is not laid on all sales, but only on first or initial sales—those by the manufacturer, producer or importer. Subsequent sales, as where purchasers at first sales resell, are not taxed. Counsel for the Government base their contention on the requirement that the tax be paid by 'the manufacturer, producer or importer'; but we think this requirement is intended to be no more than a comprehensive and convenient mode of reaching all first or initial sales, and that it does not reflect a purpose to base the tax in any way on manufacture, production or importation. Importation, as such, already was otherwise taxes, c. 356, § 1, par. 369, 42 Stat. 858, 885, U. S. S., Title 19, § 121, par. 369, and in our opinion the words relied on fall short of expressing a purpose to subject it to a further tax."

In these respects apart from the price measure there is close similarity to the tax levied in the instant cases. The taxing clause involved in the Indian Motocycle case provided

that "there shall be levied, assessed, collected and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentage of the price for which so sold or leased." It is believed that the language employed in the taxing clause in the instant cases is at least as clear in its intent to levy a tax having its incidence in sale or removal for consumption or sale and not before such sale or removal as was the indication in the *Indian Motocycle* case that sale or lease provided the incidence of the levy. It is respectfully submitted that in the light of the language of the taxing act, the Congressional debates in 1794 prior to the enactment of Chapter 51 of that year, its history, its administrative provisions and the decisions of this court interpretive of it, the levy is not one upon manufacture as was found to be the case in *Cornell* v. *Coyne* but a tax which had no incidence until sale or removal.

II.

**The decision is based upon the incorrect assumption that the tax in question is similar to the taxes involved in Cornell v. Coyne, American Mfg. Co. v. St. Louis and Wheeler Lumber B. & S. Co. v. United States.**

In the case of *Cornell* v. *Coyne*, 192 U. S. 418, the taxing clause provided as follows:

> "That upon all filled cheese which shall be manufactured there shall be assessed and collected a tax of one cent per pound, to be paid by the manufacturer thereof; and any fractional part of a pound in a package shall be taxed as a pound." (29 Statutes at large 253, Chapter 337, Section 9.)

Here the taxing clause places the tax on manufacture alone. The levy itself as contained in this clause is not made to depend on sale or removal as in the case of the tobacco tax.

The soundness of the conclusion that the construction of this clause is unaffected by the provision elsewhere in the statute which permits by reason of the medium of payment provided deferring the payment until sale or removal, it is not necessary here to question. For reasons hereinbefore set forth in the case of the excise with respect to tobacco involved in the instant cases, the taxing clause itself is susceptible of no other construction than that sale or removal is essential to the incidence of the levy itself. In the case of *Cornell* v. *Coyne*, the statute making no provision for exemption of cheese exported, it was contended that the tax violated the fifth paragraph of Section 9, Article 1, of the Constitution. The court construing the tax to be on manufacture finds no viloation. The unlikeness of the tobacco tax and the filled cheese tax in this aspect is significant. In the tobacco tax law Congress made express provision for exemption of tobacco sold or removed for export.

Again in the case of *American Mfg. Co.* v. *St. Louis*, 250 U. S. 459, the unlikeness of the taxing clause is still more evident. In this case a statute of Missouri authorized cities to license, tax, and regulate for local purposes the occupations of merchants and manufacturers, and to graduate the amount of annual license imposed upon them in proportion to the sales made by such merchant or manufacturer during the year next preceding any fixed date. Pursuant to this authority the city, by the ordinance in question, required every manufacturer in the city, before doing business, to take out a license and to pay a license tax on each $1,000 of sales made. The *State* supreme court construed this tax as one upon the privilege of manufacturing in the city and measured by the sales of the product there manufactured whether the goods were removed to another location or not. The United States Supreme Court under the usual rule adopted this construction of the State court of its own laws, saying "As a matter of construction, this,

upon familiar principles, is conclusive upon us." As so construed, the United States Supreme Court found the ordinance constitutional and not violative of either the interstate commerce clause or the due process clause.

Accordingly:

1. The case is in no way a decision of the United States Supreme Court on the point of construction for which purpose it is cited by the Government in the instant cases.

2. The language and context of the ordinance and statute is so entirely different from that in the Federal act imposing the tobacco taxes in the instant case as to afford no parallel whatsoever.

3. In the *American Mfg. Co.* case the imposition is clearly a "license tax" on the occupation of manufacture. The express language of the statute authorizing the local ordinance so states. It adopts *as a measure* of the tax the sales of the product manufactured in the city subject to the ordinance. Any other reasonable measure for the license might have been adopted. This Court finds that where the measure is limited to sales of the product manufactured in the jurisdiction having the right to impose a license tax it is reasonable and not violative of constitutional provisions. In contrast to this type of imposition, the imposition in the instant cases is clearly upon all tobacco irrespective of origin, whether manufactured in the United States or imported into it. No tobacco can exist that is not subject to the excise if it is sold or removed for consumption or sale except as the statute provides for exemption as where the tobacco is exported for consumption outside the United States. If the tobacco taxes had been aimed at manufacture, it would seem unlikely that imported tobacco would have been subjected to identically the same excise at identically the same rate and the origin of the tobacco made an immaterial factor. If the statute were to be deemed to be

aimed at manufacture it would also have to be deemed to be aimed at importation. But the very section that levies the tax provides that it is in addition to levies on importation. It is not reasonable to suppose that it was the intent of Congress to strike twice at the same act. As pointed out in the *Brady* case (*ante*) the power to levy an excise continues until the article reaches the consumer and it seems reasonable to suppose that it is an act subsequent to importation that is here being excised. Likewise, if the excise were aimed at manufacture, it would be unreasonable to measure it only by domestic consumption and exempt exports. The Federal Government in its brief quotes from language in the case of *American Mfg. Co.* v. *St. Louis* to the effect that "A somewhat similar method of postponing payment has been pursued for many years by the Federal Government with respect to the internal revenue tax upon distilled spirits." This Court appears to have felt the influence of the contention for it says in its opinion in the instant case: "True the limit of time for making payment is when the product is sold or removed, but this is a privilege designed to mitigate the burden; it indicates no purpose to impose the tax upon either sale or removal." But the tax referred to in the quoted language from the *American Mfg. Co.* case was the tax on distilled spirits, the antecedent of which Chief Justice Marshall went to some pains to distinguish from the tax upon sugars, which in connection with the earliest Congressional levy on any form of tobacco has hereinbefore been discussed.

The case of *Wheeler Lumber Co.* v. *U. S.*, 281 U. S. 572, involved a tax on transportation prior to sale and impinged neither upon sale nor removal for sale or consumption.

## III.

**The decision is based upon the incorrect assumption that the tax in question only remotely burdens the Commonwealth of Massachusetts.**

But it may be said that the case is not to rest upon an issue so narrow as whether the tax is technically a tax on manufacture or a tax on sale or a tax on both,—that the ultimate issue is whether the tax as applied in the instant cases violates the immunity to which The Commonwealth of Massachusetts is entitled. The principle that Federal taxes which impose a direct burden on the States and State taxes which impose a direct burden on the Federal Government cannot be sustained as constitutional seems definitely entrenched. But what constitutes a "direct" burden and when is the burden "indirect"? If the problem were to be approached *de novo* it might seem that the underlying objective is the protection of each member of the dual sovereignty in its own sphere and that if a tax imposed by one sovereignty is of such a nature that there is the strong probability that its burden will ultimately rest on the other, thereby exposing the other sovereignty to the mortal destruction which Chief Justice Marshall long ago perceived was involved in the power to tax, then the threat is not to be permitted even though destruction be not imminent in the particular levy itself. From Marshall's pronouncement it might have seemed reasonable to infer that the heel of Achilles is not even to be bared to the mortal dart. The majority of writers of political economy appear to agree that a tax on manufacture by and large is likely to rest ultimately upon the purchaser of the goods and yet decided cases appear to indicate that this Court has adopted the view that a tax on manufacture is not so perilous to a sover-

eign purchaser of the goods manufactured as to violate the rule of immunity. And there may be considerations that would make exceedingly difficult as a practical matter the adoption of a different view. It seems difficult as a matter of logic, however, to reconcile on grounds other than those of practical expediency the established tenet that if a tax imposes a so-called "direct" burden it is immaterial that it is so trivial in amount as to carry no actual menace to the sovereignty affected thereby on the theory of its potentiality for harm; and to deny protection in the case of taxes said to be "indirect" or "remote" but actually imposing relatively severe burden upon the theory that although admittedly there is strong probability that the burden will in fact carry through to the sovereignty there is at least a chance it will not. If such be the decided law and it would seem that it is, it is submitted that such a conception of "indirectness" or "remoteness" should not be extended to that class of cases where it is a practical certainty that the tax will be directly passed along. The *Panhandle Oil Co.*, the *Indian Motocycle Co.* and the *Graves* cases all indicated that it would not be. If as has been contended the tax in the instant cases does not have its incidence in the manufacture or importation of tobacco but it is only when the tobacco whatever its origin, whether manufactured at home or imported from abroad, is sold or removed for sale or consumption that the tax liability arises; then the tax differs in no material aspect so far as likelihood of passing on of the burden is concerned from the taxes involved in these three cases. In other words the tax has been brought to the door of the first purchaser. The distinction is precisely that pointed out by Chief Justice Marshall in *Pennington* v. *Coxe, ante,* when he distinguished between the tax on spirits, liability for which was incurred upon distillation,

and the tax on sugars, liability for which did not arise until removal. In the one case the distiller "hazards" bearing the tax himself whereas in the other, the refiner of sugars "never hazards the payment of the duty himself, because he is never to pay it until they are presumed to be sold, by being sent out of the building in which they have been refined." The refiner never can be liable "but on a fact which is considered, and properly considered, as evidencing a sale." "With respect to the refiner of sugars, then, it must be said that the legislature * * * designed him to collect the duty from the consumer, but never to pay it from the manufacture; * * *." (Citations appear earlier herein.) In other words where incidence of the liability for the tax is deferred until sale or removal for sale or consumption it is almost a certainty that the tax will be passed on to the buyer. It is submitted therefore that the tax here involved is not essentially different so far as the likelihood of transmission of the tax is concerned from the taxes involved in the *Panhandle Oil Co.*, the *Indian Motocycle Co.*, and the *Graves* cases.

## IV.

**The decision involves potentially the protection of the sovereignty not only of the Commonwealth of Massachusetts but of every State in the Union.**

The importance of the decision is not to be measured in terms of the sums involved in the instant cases, nor in terms of the potential detriment to Massachusetts alone, but extends in its possibilities to all states.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that the judg-

ment of the Supreme Court of the United States be, upon further consideration, reversed.

Respectfully submitted,

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PAUL A. DEVER,
*Attorney General,*
By ROGER CLAPP,
*Assistant Attorney General,*
*Attorneys for Petitioners.*

**Certificate of Counsel.**

I, Henry F. Long, counsel for the above-named petitioners, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

HENRY F. LONG,
*Counsel for the Petitioners.*

# SUPREME COURT OF THE UNITED STATES.

Nos. 161, 162, and 163.—October Term, 1936.

Liggett and Myers Tobacco Co., Petitioner,
161 *vs.*
The United States.

The Commonwealth of Massachusetts, Petitioner,
162 *vs.*
The United States.

Liggett and Myers Tobacco Co., on Behalf of the Commonwealth of Massachusetts, Petitioner,
163 *vs.*
The United States.

On Writs of Certiorari to the Court of Claims.

[January 4, 1937.]

Mr. Justice McReynolds delivered the opinion of the Court.

These test suits, brought in the Court of Claims and based upon the same facts, seek to establish the right of some petitioner to recover the value of Internal Revenue stamps—$17.28—affixed by Liggett and Myers Tobacco Company to four boxes containing ninety-six pounds of tobacco, which it manufactured and sold to Massachusetts for free distribution to patients in Boston State Hospital, an institution maintained by the Commonwealth and alleged to be a government instrumentality immune from Federal taxation.

During January, 1932, Federal statutes directed—

"Upon all tobacco and snuff manufactured in or imported into the United States, and hereafter sold by the manufacturer or importer, or removed for consumption or sale, there shall be levied, collected, and paid . . . a tax of 18 cents per pound, to be paid by the manufacturer or importer thereof." "The Commissioner, with the approval of the Secretary, shall prescribe and publish all needful rules and regulations for the enforcement of

this Act." Revenue Act 1926, 44 Stat. 9, Ch. 27, Secs. 401 (a), 1101; U. S. C., Tit. 26, Secs. 700, 701, 1049, 1350, 1691.

Treasury Regulations No. 8 (1928 Ed.) in force at the same time provided:

Art. 43. "The rate of tax on tobacco and snuff now in force is 18 cents per pound. . . . Such tax is imposed on all chewing and smoking tobacco. . . . The tax accrues on such manufactures upon removal from the factory or place where they were made, or upon sale prior to such removal, and is to be paid by the manufacturer thereof by the affixing of stamps before removal. . . ." Art. 52. "Each package containing a statutory quantity of tobacco or snuff (see article 45) shall, before removal from the bonded factory premises where made, have affixed thereto the proper internal-revenue stamps or stamps of such denomination as will cover fully the tax on the net weight of the contents. . . ." Art. 94. "No manufacturer of tobacco, snuff, cigars, or cigarettes will be permitted to close his factory with material or finished product unstamped on hand. . . ." Art. 152. "Every person who removes from any manufactory, or from any place where tobacco or snuff is made, any manufactured tobacco or snuff without the same being put up in proper packages, or without the proper stamp for the amount of tax thereon being affixed and canceled as required by law; or if the same be intended for export, without the proper export stamp being affixed; shall for each such offense, respectively, be fined not less than $1,000 nor more than $5,000, and be imprisoned not less than six months nor more than two years."

The Court of Claims found—

Liggett and Myers Tobacco Company is engaged in the business of manufacturing and dealing in tobacco. It maintains a bonded warehouse for storing such products. The established Internal Revenue procedure was to affix the required stamps upon manufactured tobacco before removal from the factory. In January, 1932, the Company received from Massachusetts an order to deliver ninety-six pounds of tobacco to the Boston State Hospital, an institution owned and maintained by the Commonwealth. The Company complied by shipping from its bonded warehouse four packages to which Revenue stamps amounting to $17.28 had theretofore been affixed. This was distributed to patients without charge. Hospital patients, when able, pay for treatment. The

Hospital performs useful public service. A bill for $30.62—price of the tobacco including tax—was paid by the Commonwealth.

And the Court held that operation of the Hospital by the Commonwealth is not the performance of an essential governmental function; that such operation is not of a strictly governmental character since it does not "embody some kind of control over persons or things which can be exercised only by a sovereign power". And for that reason the conclusion was that no immunity from Federal taxation had been shown. All of the petitions were dismissed.

Here counsel for the Commonwealth submit that the maintenance of the Hospital is a true governmental function entitled to immunity; also that the tax in question was laid upon the sale of the tobacco and amounted to an imposition upon the Commonwealth. They rely upon the principle approved in *Panhandle Oil Co.* v. *Mississippi ex rel. Knox,* 277 U. S. 218, 222; *Indian Motocycle Co.* v. *United States,* 283 U. S. 570, 578; and *Graves* v. *Texas Co.,* 298 U. S. 393.

For the United States it is said the tax was upon the manufacture of the tobacco with duty of payment postponed until removal or sale, whichever first occurred; consequently, there was no direct burden imposed upon the State; the effect was incidental, indirect, and permissible within the doctrine approved by *Cornell* v. *Coyne,* 192 U. S. 418, and *Wheeler Lumber B. & S. Co.* v. *United States,* 281 U. S. 572, 579.

If, in reality, the tax was upon the manufacture of tobacco then, as adequately pointed out by *Cornell* v. *Coyne, supra,* the effect upon the purchaser was indirect and imposed no prohibited burden. See *Willcuts* v. *Bunn,* 282 U. S. 216, 230, 234. We think that was the true nature of the exaction, and this renders unnecessary any consideration of the theory accepted by the Court below.

The tax is laid upon each pound of manufactured tobacco irrespective of intrinsic value or price obtained upon sale. The goods may be disposed of at any price without affecting the amount of the tax; that does not vary. Always the manufacturer must pay 18 cents upon each pound—no more, no less. True the limit of time for making payment is when the product is sold or removed, but this is a privilege designed to mitigate the burden; it indicates no purpose to impose the tax upon either sale or removal. Apparently the practice is to affix the required stamps without regard

to sale or removal. See *Cornell* v. *Coyne, supra; American Mfg. Co.* v. *St. Louis,* 250 U. S. 459; *Wheeler Lumber B. & S. Co.* v. *United States, supra.*

*Indian Motocycle Co.* v. *United States, supra,* much relied upon by petitioner, considered a tax of five per centum of the price obtained upon sale of the article; it rose or fell according to the amount received by the seller. From the outset the excise there under scrutiny had been considered by Congressional Committees and the administrative bureau as a sales tax. Here the administrative provisions of the taxing Act indicate that Congress regarded it as an excise on manufacture. And this view is strengthened by provisions of the Treasury Regulations designed to carry the statute into effect.

For the reasons indicated, the judgment below must be affirmed.

*Affirmed.*

A true copy.

Test:

*Clerk, Supreme Court, U. S.*